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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 311

ST. PAUL FIRE & MARINE INSURANCE COMPANY,
PETITIONER,

vs.

SOPHIA C. BACHMANN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 18, 1931

CERTIORARI GRANTED OCTOBER 26, 1931

(36,125)

(36,125)

SUPREME COURT OF THE UNITED STATES

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IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF WEST VIRGINIA

In Assumpsit. Law No. 360

SOPHIA C. BACHMANN, Plaintiff,

versus

ST. PAUL FIRE & MARINE INSURANCE COMPANY, a Corporation, Defendant

DECLARATION—Filed May 25, 1926

The plaintiff, Sophia C. Bachmann, a citizen and resident of the State of West Virginia, complains of St. Paul Fire & Marine Insurance Company, a corporation, duly organized and existing under the laws of the State of Minnesota, and a citizen of said State of Minnesota, and having its principal office in the City of St. Paul, Minnesota, in said state, which has been summoned to answer this: For that the defendant, by virtue of the policy of insurance, a copy of which is herewith filed, owes Four Thousand ($4,000.00) Dollars, to the plaintiff for loss in respect to the property insured by said policy, caused by fire on or about the 27th [fol. 2] day of December, in the year 1925, at No. 1312 Main Street, in the City of Wheeling, County of Ohio and State of West Virginia.

Sophia C. Bachmann, by Carl G. Bachmann, Handlan, Garden & Matthews, Her Attorneys. Carl G. Bachmann, Handlan, Garden & Matthews, Attorneys for Plaintiff.

POLICY OF INSURANCE—Filed May 25, 1926 as part of Declaration

Saint Paul Fire and Marine Insurance Company, Saint Paul, Minnesota

Incorporated 1865

No. 7040

Amount: $4,000.00. Rate: 2875. Premium: $115.00

In Consideration of the Stipulations herein named and of One Hundred and Fifteen and 00/100 Dollars Premium

Natural Gas Permit

Permission is hereby granted for the use of Natural Gas for fuel and light, subject to the following conditions:

This company will not be liable for damage by explosion of Natural Gas on the premises unless fire ensues, and then for damage by fire only.

Caution.—The heat from Natural Gas being more intense than that derived from wood or coal, property owners should see to it that all stoves have under and around them the proper zinc or other metal protection, and stove-pipe provided with dampers to prevent over-heating pipes and flues. On all stove attachments the stopcock should have a shield to indicate when open or closed, and a loose [fol. 5] key to be hung up out of reach of children. Beware of leaks in pipes.

Lightning Clause and Electrical Apparatus Clause

(Excluding Damage to Dynamos and Other Electrical Apparatus

This policy also covers direct loss or damage to the property insured by lightning (meaning thereby the commonly accepted use of the term "lightning", and in no case to include loss or damage by cyclone, tornado or wind-storm) whether fire ensues or not; it being made a condition of this contract that any loss or damage to dynamos, exciters, lamps, switches, motors or other electrical appliances or devices, such as may be caused by lightning or other electrical currents, artificial or natural, is expressly excluded, unless fire ensues, and then this Company is liable only for such loss or damage to them as may be caused by such ensuing fire. It is also a condition of this contract that if there is other insurance upon the property damaged, this Company shall be liable only for such proportion of any direct loss or damage by lightning (except as above stated) as the amount hereby insured bears to the whole amount insured thereon whether such other insurance contains a similar clause or not.

Permission is herby given to use electricity for light.

Attached to and forming a part of Policy No. 7040 of the St. Paul Fire & Marine Ins. Co., St. Paul, Minn., is-

sued through the Minnesota Underwriters' Agency, —— Insurance Company of ——.

Alex R. Campbell & Co., Agents.

8-23-50M.

Mrs. Sophia C. Bachmann.

Form No. 4

Mercantile Building under Protection

(Standard Form W. Va. Fire Underwriters' Association)

$4,000.00 On four story brick building, with approved [fol. 6] roof, and its additions adjoining and communicating, occupied as Produce Store, including foundations; partitions, vaults and fittings, fire doors, elevators and their appurtenances; engines, boilers, pumps, their settings and appurtenances; heating, lighting and ventilating equipment; piping and plumbing of every description and electrical equipment for lighting and elevator service, and on all permanent fixtures therein or thereon, situate 1312 Main St., Wheeling, W. Va.

It is understood and agreed that this does not cover the foundations below ground level.

Other insurance permitted.

Privileges Granted

Note by District Clerk.—For privileges granted see page 3 of this transcript.

Provisions Required by Law to be Stated in This policy.—This policy is in a stock corporation, and is issued under and in pursuance of the laws of the State of Minnesota relating to Guaranty Surplus and Special Reserve funds.—Chapter 437, General Laws of 1909.

This policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, which are hereby made a part of this policy, together with such other provisions, stipulations and conditions as may be endorsed hereon or added hereto as herein provided.

In witness whereof this Company has executed and attested these presents.

T. R. Bigelow, President. A. W. Perry, Secretary.

Countersigned at Wheeling, W. Va., this 12th day of February, 1924.

Alex R. Campbell & Co., Agent.

[fol. 7] Fraud, Misrepresentation, etc.—This entire policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Uninsurable and Excepted Property.—This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money, notes or securities; nor, unless specifically named hereon in writing, bullion, manuscripts, mechanical drawings, dies or patterns.

Hazards not Covered.—This Company shall not be liable for loss or damage caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises.

This entire policy shall be void, unless otherwise provided by agreement in writing added hereto.

Ownership, etc.—(a) if the interest of the insured be other than unconditional and sole ownership; or (b) if the subject of insurance be a building on ground not owned by the insured in fee simple; or (c) if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property insured hereunder by reason of any mortgage or trust deed; or (d) if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard); or (e) if this policy be assigned before a loss. Unless otherwise provided by agreement in writing added hereto this Company shall not be liable for loss or damage occurring.

Other Insurance.—(a) while the insured shall have any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or

Increase of Hazard:—(b) while the hazard is increased by any means within the control or knowledge of the insured; or

Repairs, etc.—(c) while mechanics are employed in building, altering or repairing the described premises beyond a period of fifteen days; or

Explosives, Gas, etc.—(d) while illuminating gas or vapor is generated, on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises: fireworks, greek fire, phosphorus, explosives, benzine, gasoline, naphtha or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels; or

[fol. 8] Factories.—(e) if the subject of insurance be a manufacturing establishment while operated, in whole or in part between the hours of ten P. M. and five A. M., or while it ceases to be operated beyond a period of ten days; or

Unoccupancy.—(f) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days; or

Explosion, Lightning.—(g) by explosion or lightning, unless fire ensue, and, in that event, for loss or damage by fire only.

Chattel Mortgage.—Unless otherwise provided by agreement in writing added hereto this Company shall not be liable for loss or damage to any property insured hereunder while incumbered by a chattel mortgage, and during the time of such incumbrance this Company shall be liable only for loss or damage to any other property insured hereunder.

Fall of Building.—If a building, or any material part thereof, fall except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

Added Clauses.—The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss or damage, and any

other agreement not inconsistent with or a waiver of any of the conditions or provisions of this policy, may be provided for by agreement in writing added hereto.

Waiver.—No one shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement added hereto, nor shall any such provision or condition be held to be waived unless such waiver shall be in writing added hereto, nor shall any provision or condition of this policy or any forfeiture be held to be waived by any requirement, act or proceeding on the part of this Company relating to appraisal or to any examination herein provided for; nor shall any privilege or permission affecting the insurance hereunder exist or be claimed by the insured unless granted herein or by rider added hereto.

Cancellation of Policy.—This policy shall be cancelled at any time at the request of the insured, in which case the Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by the Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

[fol. 9] Pro Rata Liability.—This Company shall not be liable for a greater proportion of any loss or damage than the amount hereby insured shall bear to the whole insurance covering the property, whether valid or not and whether collectible or not.

Noon.—The word "noon" herein means noon of standard time at the place of loss or damage.

Mortgage Interests.—If loss or damage is made payable, in whole or in part, to a mortgagee not named herein as the insured, this policy may be cancelled as to such interest by giving to such mortgagee a ten days' written notice of cancellation. Upon failure of the insured to render proof of loss such mortgagee shall, as if named as insured hereunder, but within sixty days after notice of such failure, render proof of loss and shall be subject to the provisions hereof as to appraisal and times of payment and of bring-

ing suit. On payment to such mortgagee of any sum for loss or damage hereunder, if this Company shall claim that as the mortgagor or owner, no liability existed, it shall, to the extent of such payment be subrogated to the mortgagee's right of recovery and claim upon the collateral to the mortgage debt, but without impairing the mortgagee's right to sue; or it may pay the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Requirements in Case of Loss.—The insured shall give immediate notice, in writing, to this Company, of any loss or damage, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, stating the quantity and cost of each article and the amount claimed thereon; and, the insured shall, within sixty days after the fire, unless such time is extended in writing by this Company, render to this Company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss or damage thereto, all incumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish a copy of all the descriptions and schedules in all policies and if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein [fol. 10] described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable time and place as may

be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal.—In case the insured and this Company shall fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property insured is located. The appraisers shall then appraise the loss and damage, stating separately sound value and loss or damage to each item; and failing to agree, shall submit their differences only to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's Options—Abandonment.—It shall be optional with this Company to take all, or any part, of the articles at the agreed or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required; but there can be no abandonment to this Company of any property.

When Loss Payable.—The amount of loss or damage for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss or damage is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit.—No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, nor unless commenced within twelve months next after the fire.

Subrogation.—This Company may require from the insured an assignment of all right of recovery against any party for loss or damage to the extent that payment therefor is made by this Company.

[fol. 11] Standard Fire Insurance Policy of the State of New York. Expires February 14, 1927. Property: Building. Amount: $4000.00. Premium: $115.00. Mrs. Sophia C. Bachmann. No. 7040. St. Paul Fire and Marine Insurance Co., St. Paul, Minn. Issued through the Minnesota Underwriters Agency. Alex R. Campbell & Co., Agents, 421 Wheeling Bank & Trust Bldg., Wheeling, W. Va. It is important that the written portions of all policies covering the same property read exactly alike. If they do not they should be made uniform at once.

In United States District Court

Defendant's General Issue Plea—Filed August Rules, 1926

Now comes the defendant, by Steptoe, Maxwell & Johnson, and Russell L. Furbee, its counsel, and defends the wrong and injury when, etc., and says that it is not liable to the plaintiff as she hath in her declaration alleged. And of this the defendant puts itself upon the country.

Steptoe, Maxwell & Johnson, Russell L. Furbee,
Attorneys for Defendant.

[fol. 12] In United States District Court

Plaintiff's Joinder in General Issue Plea—Filed Sept. 24, 1926

The said plaintiff as to the "statutory general issue plea" by the said defendant in this action pleaded, and whereof it hath put itself upon the country, doth the like.

Carl G. Bachmann and Handlan, Garden & Matthews,
Attorneys for Plaintiff.

In United States District Court

Specifications of Defense—Filed October 2, 1926

The defense in this action being, with other things, that the action cannot be maintained because of the plaintiff's failure to perform and comply with, and her violation of, certain clauses, conditions and warranties contained in the

policy sued upon herein, and in the paper attached and annexed to and by reference made a part of said policy, this defendant hereinafter specifies the particular clauses, conditions and warranties in respect to which such failures and violations are claimed to have occurred:

I

The policy upon which this action is based contains the following condition and warranty:

"Unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damage occurring (b) while the hazard is increased by any means within the control or knowledge of the insured."

The defendant says that at and before the time of the fire complained of, the fire hazard upon the insured building was greatly increased by divers means within the knowledge and control of the plaintiff and her agent or agents, and in at least three separate and distinct particulars, each and all of which, both separately and as a whole, consti- [fol. 13] tuted a violation of the above quoted condition and warranty, as herein below set forth, to-wit:

(a) Some time prior to said fire, to-wit, about the first day of November, 1925, the insured building was leased by the plaintiff, through her duly authorized agent or agents, to one Bill Varisca, for a certain term, to-wit, eighteen months; that at the time of the fire, and prior thereto, said Bill Varisca and some associates were operating upon and about the insured premises one or more moonshine stills for the manufacture of intoxicating liquors; that the operation of said stills upon said premises was in express violation of the prohibition and other laws of the United States, as well as of the State of West Virginia, and thereby subjected the said Bill Varisca and his associates, in case of discovery, to the danger of heavy fines and imprisonment; that in order to avoid detection and arrest, the parties operating said stills had to carry on their activities in and about said premises in a surreptitious and guarded manner, and for the most part during the night time, with the result, among other things, that in case of an outbreak of fire, the usual and proper methods for giving warning

thereof, and for the extinguishment of the same, could not and would not be used by the said occupants of the building; and that, in many other ways, said unlawful, illegal, and criminal use of the insured premises created a constant and material increase in the fire hazard thereto, and caused or contributed to the fire complained of herein, all of which was then and there known to the plaintiff and her agent or agents.

(b) The defendant further says that the moonshine still or stills aforesaid were in themselves highly dangerous instrumentalities, on account of the inflammable, combustible, and explosive substances used in and about their operation; that especially, the operation of said stills carried with it the constant danger of an explosion and fire resulting therefrom; and that the fire hazard to the insured building was greatly increased thereby, and in fact caused or contributed to the fire herein complained of, all of which facts were within the knowledge and control of the plaintiff and her agent or agents.

[fol. 14] (c) In connection with the operation of said moonshine still or stills, said Bill Varisca and his associates necessarily used large quantities of gasoline, mash, and other highly combustible, inflammable, and explosive substances, as well as open and unprotected flames and fires, all of which greatly increased the fire hazard to the insured building, and directly caused or contributed to the fire of which the plaintiff complains in this action. The defendant further says that the plaintiff, and her agent or agents, had knowledge and control of such increased hazard at and before the time of the fire.

II

The following condition and warranty is also found in said policy:

"Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occur-ing (d) while illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises fire works, greek fire, phosphorous, explosives, benzine, gasoline, nap-tha or

does insure Mrs. Sophia C. Bachmann and legal representatives, to the extent of the actual cash value (ascertained with proper deductions for depreciation) of the property at the time of loss or damage, but not exceeding the amount which it would cost to repair or replace the same with material of like kind and quality within a reasonable time after such loss or damage, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair and without compensation for loss resulting from interruption of business or manufacture, for the term of Three (3) Years from the 14th day of February, 1924, at noon, to the 14th day of February, 1927, at noon, against all direct loss and damage by fire and by removal from premises endangered by fire, except as herein provided, to an amount not exceeding Four Thousand and 00/100 Dollars, to the following described property while located and contained as described herein, or pro rata for five days at each proper [fol. 3] place to which any of the property shall necessarily be removed for preservation from fire, but not elsewhere, to wit:

Endorsement blank: Minnesota Underwriters' Agency of the St. Paul Fire and Marine Insurance Company. Name of Assured: Mrs. Sophia C. Bachmann. Copy of Endorsement made and agreed to on the 9th day of April 1925. It is hereby understood that rate has been changed on property covered under below mentioned Policy, from $2.28 to $2.075 for three years, thereby making a return premium of $19.67. Old Rate: $2.88. New Rate: $2,075. Additional Premium: $—. Return Premium: $19.67. Attached to and forming part of Policy No. 7040 of the Wheeling Agency of the Minnesota Underwriters' Agency of the St. Paul Fire and Marine Insurance Company, St. Paul, Minn. Alex R. Campbell & Co., Agent. If assignment, is it upon actual sale? ——. Cash value of property insured: $——. If mortgaged, state amount: $——. Value of entire property mortgaged: $——.

Form No. 4

Substituted Form V

Mercantile Building under Protection

(Standard Form W. Va. Fire Underwriters' Association)

$4,000.00 on three story brick building, with approved roof, and its additions adjoining and communicating, occupied for bottling Automobile Oils, Offices and other Mercantile purposes not more hazardous, including foundations; partitions, vaults and fittings, fire doors, elevators and their appurtenances; engines, boilers, pumps, their settings and appurtenances; heating, lighting and ventilating equipment; piping and plumbing of every descrip- [fol. 4] tion and electrical equipment for lighting and elevator service, and on all permanent fixtures thereon, situate at No. 1312 Main Street, Wheeling, W. Va.

Privileges Granted: To keep for sale not to exceed fifty pounds of gun powder and ten barrels of kerosene oil, the latter to be drawn only by daylight, or at a distance of not less than 10 feet from artificial light, except incandescent electric light; for other insurance without notice until required; to be vacant not exceeding sixty (60) consecutive days; to be unoccupied not exceeding sixty (60) consecutive days; to make ordinary alterations and repairs in the within described premises, but this shall not be held to include the reconstruction or the enlargement of the same, and this policy (so far as it applies on building) shall also cover in accordance with the conditions of this policy all materials and supplies therefor, therein, or adjacent, and such alterations; to make alterations, additions or repairs for sixty days at any one time and this policy (so far as it applies on building) shall also cover in accordance with the conditions of this policy all materials and supplies therefor, therein or adjacent, and such alterations or additions and (so far as it applies on contents) shall extend to cover in such additions; and for present and other occupancies not more hazardous and to do such work and to keep and use such materials as are usual in such occupancies.

any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding 25 pounds, or kerosene oil exceeding five barrels."

The defendant says that at the time of the fire complained of, and prior thereto, large quantities of gasoline, explosives, mash and other highly combustible and inflammable substances were being kept, used and allowed upon and about the insured premises, all of which was well known to the plaintiff and her agent or agents, and was in violation of the foregoing condition and warranty.

III

The following condition and warranty is also contained in the policy sued upon herein:

"This entire policy shall be void if the insured has con- [fol. 15] cealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

The defendant says that on or about the 17th day of February, 1926, there was forwarded by the plaintiff to the defendant a paper purporting to be a proof of loss in connection with the fire herein complained of, which paper was signed by the plaintiff and sworn to and acknowledged by her before one J. Wilbert Johnson, a Notary Public in and for Ohio County, West Virginia. The above quoted condition and warranty was violated by the sworn statements made by the plaintiff in said paper, in at least two separate and distinct instances, to-wit:

(a) Said paper contained a sworn statement by the plaintiff to the effect that the insured building was being occupied at the time of the fire for "mercantile purposes by Bill Varisca, and for no other purpose whatever." The defendant says that said statement was false and untrue, as the plaintiff well knew, and was made for the purpose of deceiving and defrauding this defendant. The defendant says that, in fact, the insured building was being occupied at the time of the fire by Bill Virsca (or Varisca) and his associates, not for mercantile purposes, but for the purpose of

operating one or more moonshine stills for the manufacture of intoxicating liquor, and for other illegal and unlawful purposes, of all which the plaintiff and her agent or agents had knowledge.

(b) In said paper, the plaintiff made a sworn statement to the effect that the origin of the fire complained of was "unknown." The defendant says that, as a matter of fact, and as the plaintiff and her agent or agents well knew, said fire originated on account of the illegal and highly dangerous uses being made of the insured building by the plaintiff's tenant, Bill Varisca, and his associates, which said uses of the premises were within the control and knowl-
[fol. 16] edge of the plaintiff and her agent or agents; and that said false and misleading sworn statement was deliberately made by the plaintiff for the purpose of deceiving and defrauding this defendant.

And so the defendant says that, by reason of the plaintiff's violation of and failure to comply with the several clauses, conditions and warranties hereinbefore specified, and each and all of them, the policy sued upon has been rendered null and void, and the plaintiff cannot recover in this action.

St. Paul Fire & Marine Insurance Co., by Counsel.
Russell L. Furbee, Steptoe, Maxwell & Johnson, Counsel.

Duly sworn to by James M. Guiher. Jurat omitted in printing.

[fol. 17] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S REPLY TO SPECIFICATIONS OF DEFENSE—Filed Nov. 7, 1929

No. 1

Plaintiff answering defendant's Specifications of Defense No. 1 (a), No. 1 (b) and No. 1 (c) for answer says, that neither she nor her agent or agents had any knowledge of the facts, charges and allegations set out in said Specifications; that neither she nor her agent or agents had any knowledge or control of, over or concerning any of said

facts, charges and allegations. Plaintiff replying further says that added and attached to and made a part of the policy of insurance sued upon herein is a certain agreement in writing (commonly called a rider) which was executed by the said defendant or its authorized agent and attached to and made part of said policy and which is of the following tenor:

"Form No. 4

Sophia C. Bachman

Mercantile Building under Protection

(Standard Form W. Va. Fire Underwriters Association)

Substituted Form

NOTE BY DISTRICT CLERK.—See page 3 of this transcript.

And for further answer and reply to said Specification No. 1 (a), No. 1 (b) and No. 1 (c), the said plaintiff joins issue thereon.

No. 2

For answer to the defendant's Specification of Defense No. 2, plaintiff says that neither she nor her agent or agents had any knowledge of the facts, charges and allegations set out in said specification; that neither she nor her agent or agents had any knowledge or control of over or concerning said facts, charges and allegations nor of any increased hazard at or before the time of the fire. Plaintiff replying [fol. 18] further says that added and attached to and made part of the policy of insurance sued upon herein is that certain agreement in writing (commonly called the rider), which was executed by the said defendant or its authorized agent and attached to and made part of said policy and which is set out in extenso in plaintiff's answer to Specification No. 1 (a), 1 (b) and 1 (c) and which is here referred to and by reference thereto is made part hereof.

Plaintiff says further that prior to and to ascertain the condition and contents of said insured premises and property with specific and particular reference to the advisability of executing and attaching said rider to said policy

that the defendant's duly authorized agent went upon and inspected said insured premises and the contents thereof and was fully apprized and advised as to the condition of said premises and of said contents, materials and supplies and of the nature and of the business which was then being carried on therein and thereon.

And for further answer and reply to said Specifications of Defense No. 2, the said plaintiff joins issue thereon.

And so the plaintiff says that by reason of the matters and things answered, replied and alleged by the said plaintiff to the said various Specifications of Defense filed by the said defendant and each and all of them the said policy sued upon has not been rendered null and void, but that on the contrary the liability of the said defendant has not been affected or lessened but that the said plaintiff has a right to recover in this action.

Sophia C. Bachmann, by Counsel. Carl G. Bachmann and Handlan, Garden & Matthews, Attorneys for Sophia C. Bachmann.

[fol. 19] *Duly sworn to by Carl G. Bachmann. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

ORDER EMPANELING JURY AND COMMENCING TRIAL—Entered Nov. 7, 1929

This day came the plaintiff, Sophia C. Bachmann, by Carl G. Bachmann, Esq., G. Alan Garden, Esq., and J. Bernard Handlan, Esq., her Attorneys, and then and there came as well also the defendant, St. Paul Fire and Marine Insurance Co., St. Paul, Minn., a corporation, by Russell L. Furbee and James M. Guiher, its Attorneys, and the said defendant having at rules filed its Specification of Defenses herein Numbered respectively 1, 2 and 3, now with leave of the Court withdrew its said Specification No. 3 and thereupon with leave of the Court, the said plaintiff now in open court files her certain Answer and Reply to the said Speci-

fications of Defense Numbered 1 and 2 filed by the said defendant herein, and the same are made part of the record [fol. 20] herein and for further plea in this behalf, the said defendant pleads "non-assumpsit" and to the said Replies of the said plaintiff the defendant's specifications, the said defendant replies generally.

Thereupon came Louis E. Schrader, a qualified and official stenographer and Court Reporter, who, was then duly sworn as an official reporter of this Court in this acton.

Thereupon came a jury, to-wit: Edward F. Frei, S. L. Long, Charles W. Duers, Dora Smith, B. S. Henderson, Seabury Buzzard, J. E. Bloyd, W. C. Connell, W. H. Anderson, Elmer Jackson, A. D. Peake and J. Brady Davis, twelve good and lawful men, selected, tried and sworn as the law directs to well and truly try the issues joined herein and a true verdict render according to the law and the evidence, who having heard the opening statements of counsel, and having heard the evidence adduced, and the hour of adjournment having arrived the said jury is adjourned until tomorrow morning at nine thirty, to which time the further hearing in this case is continued.

In United States District Court

Order-Trial Continued and Directed Verdict for Plaintiff Refused—Entered Nov. 8, 1929

This day came again the parties hereto as on yesterday, and came also the jury heretofore empaneled and sworn in this case, and they having heard the conclusion of the testimony offered upon behalf of the defendant, were excused until tomorrow morning at nine thirty and retired from the court room.

Thereupon the plaintiff moved the court to exclude the testimony offered by the defendant and to direct the jury to return a verdict in her favor, which motion being argued by counsel, and considered by the court, was over-ruled, to which ruling of the court the plaintiff excepted. And the hour of adjournment having arrived, further hearing in this case is continued until tomorrow morning at nine thirty.

[fol. 21] IN UNITED STATES DISTRICT COURT

ORDER-TRIAL CONTINUED—Entered Nov. 9, 1929

This day came the plaintiff and defendant hereto as heretofore, and came also the jury heretofore empaneled and sworn in this case pursuant to their adjournment on yesterday, and they having heard the testimony adduced, and the hour of adjournment having arrived, and adjourned until Monday morning at nine thirty, to which time the further hearing in this case is continued.

IN UNITED STATES DISTRICT COURT

ORDER-TESTIMONY COMPLETED, MOTION FOR DIRECTED VERDICT, AND DEFENDANT'S MOTION WITHDRAWN—Entered Nov. 11, 1929

This day came again the parties hereto as heretofore, and came also the jury heretofore empaneled and sworn in this case pursuant to their adjournment on Saturday, and the jury having heard the conclusion of the testimony, thereupon out of the hearing of the jury the defendant moved the court to exclude the testimony offered upon behalf of the plaintiff and direct the jury to return a verdict in its favor; thereupon, out of the hearing of the jury the plaintiff moved the court to direct the jury to return a verdict in her favor upon all the testimony offered. Thereupon the defendant moved the court to be allowed to withdraw its first motion, which motion to withdraw defendant's motion for a directed verdict was resisted by the plaintiff, and the court having considered said last motion, doth allow the same, to which ruling of the court the plaintiff excepted. Thereupon, the court having considered the motion of the plaintiff to direct a verdict in her favor, doth overrule the same, to which ruling of the court the plaintiff excepted. Thereupon the jury having heard the arguments of counsel and the hour of adjournment having arrived, and adjourned until tomorrow morning at nine thirty, to which time the further hearing in this case is continued.

[fol. 22] IN UNITED STATES DISTRICT COURT

ORDER-VERDICT OF JURY RENDERED—Entered Nov. 12, 1929

This day came again the parties hereto, as heretofore, and came also the jury heretofore empaneled and sworn in this cause, pursuant to their adjournment on yesterday, and they having heard the instructions of the court, retired to their room to consider of their verdict, and after a time returned into court, and upon their oaths, do say, "We, the jury, find for the Plaintiff and assess her damages at $4,591.84. A. D. Peake, Foreman". And the hour of adjournment having arrived the further hearing in this case is continued until tomorrow morning at nine-thirty.

IN UNITED STATES DISTRICT COURT

FINAL JUDGMENT ORDER—Entered November 13, 1929

This day came again the parties hereto as heretofore. Thereupon, the defendant moved the court to set aside the verdict of the jury rendered in this case on yesterday, and grant it a new trial, which motion being considered by the court, is overruled, to which ruling of the court the defendant excepted. Thereupon the defendant moved the court in arrest of judgment upon the verdict so rendered against it, which motion having been considered by the court, is overruled, to which ruling of the court the defendant excepted.

It is therefore considered by the court that the plaintiff Sophia C. Bachmann, do recover of and from the defendant, St. Paul Fire and Marine Insurance Company, St. Paul, Minn., a corporation, the sum of Four Thousand Five Hundred and Ninety-One Dollars and Eighty-Four Cents ($4,591.84), with interest thereon from this date until paid, and the costs of the plaintiff herein expended.

And the defendant having intimated through counsel its intention to appeal from the judgment herein rendered against it, it is ordered that the said defendant be and it hereby is given 90 days from this date within which to file and have saved to it its proper bills of exceptions herein, and execution upon the said judgment herein rendered is stayed for a like period, without bond, the plaintiff having

[fol. 23] in open court waived bond for stay of execution. Enter- November 13, 1929.

W. E. Baker, Judge.

Satisfactory.

G. Alan Garden, of Counsel for Plf. Russell L. Furbee, of Counsel for Defendant.

IN UNITED STATES DISTRICT COURT

Defendant's Bill of Exceptions—Filed February 3, 1930

CAPTION

Be it remembered that the above case was tried in the District Court of the United States for the Northern District of West Virginia, at Wheeling, at the October, 1929, term thereof before Honorable William E. Baker, Judge of said District Court, and a jury, commencing on the 7th day of November, 1929.

Mr. J. B. Handlan and Mr. G. Alan Garden of Messr. Handlan, Garden and Matthews, Attorneys at Law, of Wheeling, West Virginia, and Honorable Carl G. Bachmann, of Wheeling, West Virginia, were counsel for the plaintiff.

Mr. James M. Guiher, of Messrs. Steptoe & Johnson, Attorneys at law, of Clarksburg, West Virginia, and Mr. Russell L. Furbee, of Fairmont, West Virginia, were counsel for the defendant.

Mr. Louis E. Schrader, Shorthand Reporter, of Wheeling, West Virginia, was sworn to act as the official reporter in this case.

STIPULATION

Before the taking of testimony was commenced, the following stipulations were made upon the record by counsel for the parties:

1. That the final result of this case shall control the final result in the two companion cases of the above named plaintiff against the Caledonian Insurance Company of Scotland [fol. 24] and against the American Central Insurance Company of St. Louis, Missouri.

2. That the defendant company is a foreign corporation and at the time of the issuing of the policy herein, and of the issuing of the riders thereon, was carrying on a fire insurance business in the State of West Virginia.

3. That the policy of insurance sued upon herein and riders thereto attached were duly accepted and delivered, and the premiums thereon paid, and were in full force and effect at the time of the fire, unless the policy had been forfeited and nullified by the alleged violations as set forth in the defendant's Specifications of Defense Nos. 1 and 2 filed in this case.

4. That the defendant has regularly and properly filed its Specifications of Defense Nos. 1, 2 and 3 in this case, but now withdraws and abandons its Specification of Defense No. 3, relating to alleged false statements in the proof of loss.

Thereupon, the plaintiff, to maintain the issues on her part, introduced the following testimony:

CHARLES F. BACHMANN

Direct examination:

Has lived at Wheeling, West Virginia, for sixty-five years and is the husband of the plaintiff Sophia C. Bachmann, who was the owner of the insured building at the time of the fire. A fire occurred at this property about six o'clock on Sunday evening, December 27, 1925, and the building was practically totally destroyed. My estimate for the loss was over fifteen thousand dollars. I made a contract with Edward Bachmann for replacing or repairing the property, for $15,000.

At this point, the following papers were offered and introduced in evidence, and properly identified as exhibits herein, without objection:

1. Fire insurance policy No. 7040 issued by the defend-
[fol. 25] ant St. Paul Fire & Marine Insurance Company to the plaintiff Sophia C. Bachmann being in the amount of $4,000.00, and issued under date of February 14, 1924, together with the rider attached thereto or Form No. 4 relating to the privileges granted. This policy was duly

identified by the Reporter as "Plaintiff's Exhibit No. 1—C. F. B."

2. The original proof of loss furnished after the fire by the plaintiff to the defendant St. Paul Fire & Marine Insurance Company, which was duly identified by the Reporter as "Plaintiff's Exhibit No. 2—C. F. B."

The said two exhibits aforesaid were in the words and figures following, to-wit:

NOTE BY DISTRICT CLERK.—For "Plaintiff's Exhibit No. 1—C. F. B." See page 2, et seq., of this transcript

PLAINTIFF'S EXHIBIT No. 2—C. F. B. PROOF OF LOSS

Proof of Loss

Policy No.: 7040. Renewal No.: —. Amount of Policy: $4,000.00.

St. Paul Fire & Marine Insurance Company of St. Paul, Minn.

By Your Policy of Insurance No. 7040, issued at your Wheeling, W. Va., Agency, dated the 14th day of February, 1924, and expiring the 14th day of February, 1927, at 12 o'clock noon, you insured Mrs. Sophia C. Bachmann against loss or damage by fire, to the amount of Four Thousand and No/100 Dollars, according to the terms and conditions printed therein; the written portion and all endorsements, transfers and assignments being as follows: $—.

Mrs. Sophia C. Bachmann.

Form No. 4

Mercantile Building under Protection

(Standard Form W. Va. Fire Underwriters' Association)

$4,000.00 on three-story brick building, with approved roof, and its additions adjoining and communicating, occupied for bottling automobile oils, offices and other mercantile purposes not more hazardous, including founda-
[fol. 26] tions; partitions, vaults and fittings, fire doors, elevators and their appurtenances; heating, lighting and

ventilating equipment; piping and plumbing of every description and electrical equipment for lighting and elevator service, and on all permanent fixtures therein or thereon, situate at No. 1312 Main Street, Wheeling, West Va.

#7040—St. Paul Fire & Marine Insurance Company—Mrs. Sophia C. Bachmann.

Policy originally issued for $4,000.00.

In May, 1924, claim was paid amounting to	$174.40
In Sept., 1924 " " " " "	41.11
Policy reduced	$215.51
Amount in force at time of fire December 27, 1925	$3,784.49

Privileges Granted

NOTE BY DISTRICT CLERK.—For Privileges Granted see page 3 of this transcript.

Schedule "B" attached hereto, contains a complete list of all Policies held by her at the time of the fire, covering on property herein described. Full copies of the written portions thereof will be furnished on demand.

The property described in said policy belonged, at the time of the fire hereinafter mentioned, to Mrs. Sophia C. Bachmann, and no other person or persons had any interest therein, except as mentioned below.

If the loss is on building, state whether Real Estate is owned in fee simple or held on lease—In fee simple.

State the nature and amount of incumbrance at time of the fire—None.

The building described, or containing the property described in said policy, was occupied at the time of the fire as follows:

First floor, mercantile purposes by Bill Virsca.
Second floor, " " " " "
Third floor, " " " " "
Fourth floor, mercantile purposes by Bill Virsca.
Fifth floor, ——.

and for no other purpose whatever.

A fire occurred on the 27th day of December, 1925, about the hour of 5:02 o'clock p. m., by which the property described by said policy and situate as therein named was

destroyed or damaged, as hereinafter set forth in detail, said fire originating as follows: Unknown.

[fol. 27] The actual cash value of each specific subject thus situated and described by the aforesaid policy at the time of loss, and the actual loss and damage by said fire to the same, as shown by annexed schedule, and for which claim is hereby made, were as follows:

	Sound value	Total loss	Total insurance	Amount named in this policy	Claimed under this *this* policy
1st item of policy.....	26,350.00	15,139.98	14,515.10	3,784.49	3,784.49
2d item of policy.....	.....	.....	.....	.....	.....
3d item of policy.....	.....	.....	.....	.....	.....
4th item of policy.....	.....	.....	.....	.....	.....
5th item of policy.....	.....	.....	.....	.....	.....
Total	26,350.00	15,139.98	14,515.10	3,784.49	3,784.49

Total Amount claimed of this Company under above named Policy $3,784.49

(For a detailed statement of value and loss, see schedule herewith, which is made a part of this Proof of Loss.)

At the time said insurance was effected, the property described by said policy belonged to Mrs. Sophia C. Bachmann, and the said fire did not originate by any act, design or procurement on the part of the assured, or this affiant, or in consequence of any fraud or evil practice done or suffered by said assured, this affiant; nothing has been done by or with the assured's or this affiant's privity or consent to violate the conditions of the policy, or render it void; no articles are mentioned herein but such as were in the building damaged or destroyed, and belonging to, and in possession of, the said assured at the time of said fire; no property saved has been in any manner concealed, and no attempt to deceive the said Company, as to the extent of said loss, has in any manner been made.

Any other information that may be required will be furnished on call, and considered a portion of these proofs.

It is expressly stipulated that there has been no waiver of any of the rights or defenses of this Company by the furnishing of this "Proof of Loss" blank to the assured, or making up of proofs by an adjuster, or any agent of the Company or Companies named herein, or in any other way whatever.

Brick masonry:	
Repairing South wall Building in around joist ends	375.00
Rebuilding North Party wall down to second floor line	1150.00
Tin roof, 32 squares	640.00
Replacing awning	125.00
Plate Glass	163.38
Extra Glass (Offices)	65.00
Painting, 2 coats	490.00
Metal Ceilings First & Second Floors	725.00
Elevator Pent House & Supports	400.00
Elevator	2575.00

[fol. 30]

Wiring

Basement	55.00
" center lights	
" Pull chain drop	33.00
1 switch	6.50
First Floor	
" " Center Lights	55.00
4 lights in offices	20.00
Sw. for Cut Lights	6.50
11 Pull Chain Drops	33.00
4 chain fixtures	16.00
Entrance Light	19.00
Second Floor Lights	
" " Center lights	55.00
11 Pull Chain Drops	33.00
1 Switch	6.50
Third Floor	
Same as Second Floor	94.50
Light Service	80.00
" Panel	25.00
Wiring Elevator	175.00

Plumbing & Gas

Roughing in material	160.00
3 Enamel Closets, Combinations Complete	105.26
3—18"x21" Lavatories	65.00
18 Gas Fires—6 on each floor	126.50
3 Hose Connections	12.50
Labor	395.00

Schedule "B" of Insurance and Apportionment of Claim

No. of policy	Date of expiration of policy	Name of company	Amount* of policy	Total claim	1st item, $— Amount insures	1st item, $— Amount claimed
7040	Feb. 14, 1927	St. Paul Fire & Marine Insurance Company	3,784.49	3,784.49	.....	.....
4825	Oct. 1, 1926	American Central Insurance Company	4,730.61	4,730.61	.....	.....
3560060	June 12, 1928	Caledonian Ins. Co.	6,000.00	6,000.00	.....	.....
		Totals	14,515.10	14,515.00	.....	.....

*When one item, fill this column only.

[fol. 31] NOTE BY DISTRICT CLERK.—2nd, 3rd, 4th, and 5th Items, corresponding to 1st Item $— above, being blank, are omitted.

Claim No. —. Proof of Loss. St. Paul Fire & Marine Ins. Co. of St. Paul, Minn. Policy No. 7040. Amount of Policy: $4000.00 (3784.49). Assured: Mrs. Sophia C. Backmann. Agency: Wheeling, W. Va. Date of Fire: December 27th, 1925. Proof Received —— —, 19—. Amount Claimed: $3784.49. Amount Allowed: $——. Less Discount: $——. Amount Paid: $——. Rec'd Feb. 19, 1926. St. P. F. & M. Ins. Co., Loss Dept.

Adjuster's Certificate

This is to certify that I have carefully examined the detailed evidence of loss sustained by the insured named herein, and I hereby recommend that the sum of — Dollars be the basis of settlement, and that the Insurance Company named herein pay the insured the sum of — Dollars.

Dated —— —, 19—.

—— ——, Adjuster.

[fol. 32] The policy introduced in evidence covered the property destroyed by the fire in question, and the rider attached thereto was attached prior to the time of the fire, at least six or eight months before. The proof of loss was prepared and executed by the plaintiff and sent into the defendant company, and the defendant company acknowledged receipt thereof. The defendant company has paid nothing whatsoever under its policy by reason of the fire which occurred on December 27, 1925.

Cross-examination:

The policy introduced in evidence covers a building located on the east side of Main Street in the City of Wheeling, known as 1312 Main Street. The building is located in the heart of the business section of the city of Wheeling, Main Street being the second best business street in the city. The building had three stories and a fourth story which was really only a half story. The roof on the building slanted, with the result that the building was substantially a four-story building on Main Street, but the fourth story only extended back therefrom about fifty or sixty feet, making the

rear three story. I have looked after the supervision, handling and leasing of this building for many years upon behalf of my wife, the legal owner, and was so looking after all her various properties, including this building, in December, 1925, and long prior to that time. I was not in the building at the time of the fire, and did not have a key thereto, the fire occurred on December 27, 1925, on Sunday afternoon near 6:00 P. M. The man that I had leased the property to for my wife had the key. The building had been leased to a man named Bill Varisca, who was a foreigner, and I believe an Italian.

Witness then examined the original lease of the insured property to said Bill Varisca, the instrument being dated October 29, 1925. The lease commenced on the first day of November, 1925, and expired on the 30th day of April, 1927. Witness here identified the instrument as the original lease. I signed the lease myself upon behalf of my wife, and it was also signed by Bill Varisca. The instrument was signed at my office in the Riley Law Building, in Wheeling.

[fol. 33] Thereupon, the said lease dated October 29, 1925, was introduced in evidence by the defendant, without objection, and was identified by the Reporter as "Defendant's Exhibit No. 1", said exhibit being in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT 1

"This lease, made and entered into this 29th day of October, 1925, by and between Charles F. Bachmann, of Wheeling, West Virginia (hereinafter designated Lessor) and Bill Verisca, of Martins Ferry, Ohio (herenafter designated Lessee),

"Witnesseth: That the said Lessor has and by these presents doth lease unto the said Lessee, for the sole purpose of conducting a wholesale grocery and produce business, the following described premises situated on the East side of Main Street in the City of Wheeling, for the term of one year and six months, that is to say: The four story brick building and premises designated and known as Number 1312 Main Street, Wheeling, Ohio County, West Virginia. Excepting, however, the office on the third floor and the fourth floor of said building and premises which is hereby reserved by the said Lessor for their own use and

purposes with right to ingress and egress at any time, with use of the elevator.

"To have and to hold the same for the full term of One (1) year and Six (6) months, commencing on and including the first day of November, 1925, and ending on the 30th day of April, 1927, and the said Lessee hereby agrees and binds themselves to pay or to cause to be paid unto said Lessor, his heirs, personal representatives or assigns, the just and full sum of Six Thousand Three Hundred ($6,300.00) Dollars, payable in equal monthly installment of Three Hundred Fifty ($350.00) Dollars, in advance, on the first day of each and every month, beginning on the first day of November, 1925, and monthly thereafter during the term hereby created.

Said Lessee agrees, that he will not transfer or assign this lease, or sub-let the premises aforesaid or any part thereof without the written consent of the said Lessor, his personal representatives, or assigns. And the said Lessee [fol. 34] shall remain liable for the fulfillment of all promises, covenants, conditions or stipulations contained in this lease including the payment of all rents, charges and payment of every kind and character to be made under and by the said Lessee; but it is expressly understood and agreed by and between said Lessor and said Lessee, for themselves, heirs and personal representatives, that neither this lease nor any part of it shall be assignable by reason of failure, insolvency, or proceedings taken by said Lessee for the purpose of liquidation, nor shall this lease be assignable by bankruptcy proceedings instituted by or against the said Lessee.

Said Lessee further agrees to protect the elevator, all water pipes, drains, plumbing and glass on the premises herein leased, and to repair the same at their own expense, and to keep said premises generally in repair and in a clean and healthy condition in accordance with ordinances of the City of Wheeling, and laws of the State of West Virginia, and to surrender said premises at the expiration of this lease or sooner termination thereof by forfeiture, or otherwise in as good condition as when the same were entered upon, unavoidable accidents, natural wear and tear excepted. It is strictly understood and agreed that the Lessee will immediately repair and keep in repair the elevator so that it can be used at all times.

"It is expressly understood by the said Lessor and said Lessee that the said Lessee will not have, nor permit on said premises, intoxicating liquors of any kind or character, and the keeping of same, or the permitting of same on said premises, shall at the option of the said Lessor terminate the tenancy hereby created.

"It is agreed by and between the said Lessor and the said Lessee that if there are any repairs or alterations to be made to the aforesaid premises the same shall be made by and at the expense of the Lessee but before doing so the said Lessee shall give two weeks notice in writing to the said Lessor, his successors or assigns, and shall receive the written consent of the said Lessor, his successors and assigns, to make such alterations and repairs.

"And it is further stipulated and agreed that the said Lessee is to vacate, surrender and give prompt and peace-[fol. 35] able possession of the aforesaid premises unto the said Lessor, his successors or assigns at the expiration of this lease, unless aforesaid premises are again leased unto the said Lessee by written agreement.

"It is further agreed that the said Lessor, his heirs, personal representatives, agent or assigns may enter into and upon the premises at any time said Lessor shall desire, to examine same or to make repairs and for three months next preceding the expiration of said term to place the usual notices of 'For Rent' and 'For Sale' on any outside wall of said premises and remain thereon without hindrance or molestation. If said premises become vacant or deserted during the said term said Lessee does hereby authorize the said Lessor, his heirs, personal representative, agent or assign to recover the same at their option and relet and receive and apply the rent so received to the payment of rent due by these presents.

"If at any time during the continuance of this lease the said Lessee shall fail to comply with any and all of the promises and agreements herein contained, the said Lessor, his heirs, personal representatives and assigns, shall have the right to re-enter and possess the leased premises as aforesaid, the same as though this lease had not been made, but his or their so re-entering and being so possessed shall not bar or preclude him or them from pur-

suing the other remedies known to the laws of West Virginia for the collection of rent and damages.

"No failure of the Lessor to collect promptly when due the rent hereunder for any month or any part of the prompt payment thereof, nor any indulgence by the rent for any month or any part thereof after default in the rent due for any month, nor the acceptance of the Lessor extended to the Lessee respecting the payment of rent for any month or any part thereof after default in the prompt payment thereof, nor any indulgence by the Lessor extended to the Lessee respecting the payment of the rent for any month or any part thereof, shall be construed as a waiver by the Lessor of the prompt payment when due of the rent or any part of it for any other month, or as a waiver by the Lessor of his right to re-enter for non-[fol. 36] payment of rent for any such other month, or as establishing a course of business between the landlord and tenant to be followed thereafter.

"Witness the following signatures and seals:

"Chas. F. Bachmann. (Seal.) Bill Varisca. (Seal.)

(Endorsement:) "Lease. Charles F. Bachmann to Bill Varisca."

Under the aforesaid lease, I reserved the right to the possession and use of an office which was located on the third floor of the insured building, about fifteen feet from the Main Street end on said floor; at this time I could get up to this office either by a stairway or by the elevator.

"Q. That is you had a stairway running up and also an elevator?

A. Yes, sir.

Q. But I believe the elevator, at the time of the fire, December 27, 1925, was not running, was it?

A. Well, I left the building about Thanksgiving Day, or before, a day or so. I went to the power company and had all the power shut off—discontinued.

Q. So that at the time of the fire the electricity was cut off from the building, and also, I believe, the natural gas was turned off, wasn't it?

A. I had that attended to, but I can't say whether they turned it off that day or not. I gave notice to have it turned off.

Q. It was done shortly after that?
A. Yes, sir.
Q. And before the fire?
A. Yes, sir.
Q. So that any one going up to your office on the third floor after what I believe you describe as Thanksgiving Day, 1925, had to walk up the stairs, did they not?
A. Yes, sir."

The third floor of the building was one large room, with the office about fifteen feet "cut off in front". The door to the office was located about the middle of the building. The stairway came up on the side of the building so that [fol. 37] a person walking up the stairs would come out on the third floor and then walk a distance of about ten feet to the office door. At the time the lease was executed I delivered the keys to Bill Varisca, and the building was locked up. The last time I saw Bill Varisca was when I delivered to him the lease and the keys. I got the money on the same day. The lease provides for monthly rental of $350.00, and Varisca paid me three months' rent in advance, that is $1,050.00, all in cash. I have never seen Bill Varisca since, and he never showed up or could be found after the fire.

When Bill Varisca approached me about renting this property, I was not acquainted with him and, so far as I know, none of my acquaintances knew him. I do not think I has ever seen him before. He had no letter of introduction to me. He came originally to my office on the third floor of the insured building at 1312 Main Street. He came there two or three different times. The last time he came to see me, and when he got the lease, was after I had moved out of the insured building and into my office in the Riley Law Building. The elevator shaft in the insured building was located near the Main Street end of the building, approximately fifteen to twenty feet from the front end. The advance payments, aggregating $1,050.00 in cash, made to me by Bill Varisca were to cover the last three months of the lease. I told him that I did not know him and that "you got to identify yourself with me or give me security". I said, "If you bring me some security of somebody to identify you this is all right. If not, you must pay me three months' rent in advance, to

be applied at the end of the lease, provided that you fail to make any payment of the lease in advance, and payment of rent in advance, as per your contract, you forfeit your lease and you forfeit your money". All if this conversation took place in the Riley Law Building.

Redirect examination:

The Varisca lease, dated October 29, 1925, was actually signed and delivered on that day, and the keys were then delivered. I moved out of the insured building on Thanksgiving day, 1925. My son Carl left for Washington on [fol. 38] Thanksgiving morning. I moved out the same day, and by referring to a telegram, I find that it was on November 26, 1925, that I left the building. On that day, I moved my office from the insured building on Main Street to my son Carl's law office in the Riley Law Building. I do not mean that I occupied the Main Street Building from October 29th to November 26th.

When Varisca came to my office in the insured building on Main Street and agreed on the lease, he paid me one month's rent in advance, that is, $350.00. This was done prior to October 29, 1925, some time in September. I agreed on a lease with him at that time, but did not deliver one to him. I told him that I would have to have a lease prepared and would deliver it to him later, which I did. I actually got the $350.00 payment before the lease was executed or delivered, and the payment of $1,050.00 was made at my office in the Riley Law Building when the lease was delivered to Varisca. I told Varisca: "Now, I don't know you. You have got to give me security or identify yourself—give me some recommendation, or in lieu of that you have got to pay me."

I moved into the Riley Law Building on Thanksgiving day, November 26, 1925, and it was there that Varisca paid me $1,050.00, and I turned the keys over to him. I carried the keys until after I had moved out of the Main Street Building on Thanksgiving day. Varisca paid me the rent for the month of November in September, and he got the lease the day it was signed. It was at the Riley Law Building when I turned over the keys to Varisca that I exacted the three months' rent from him.

When I moved out of the insured building on Main Street, I left there a couple of flat top desks, a typewriter, three safes and office fixtures. Several times thereafter I went down to the building in order to get in, looked at the door, and shook the door several times with Dr. Hersey and once with Ed Diehl, to see if we could get some papers that we had left there in the safe. I was unable to get in the building. That was after I had delivered the keys. I left the insured building on Thanksgiving day 1925, and never was in the building thereafter until the time of the fire. Thereupon the following questions were asked the witness by counsel for the plaintiff, and the following answers were made by him:

[fol. 39] "Q. How was it that you continued carrying the key during the month of November, from the first of November, the day of the beginning of his tenancy, up until the 26th day of November, Thangsgiving day, the day you turned the key over?

A. I had to make a lease, and I hadn't made that. I just made the contract with him, and agreement with him, and he bound it by paying $350. Then when I gave him the lease, as I told Mr. Guiher, I didn't know him, I wanted some identification or security to stand good for him.

Q. You mean when you gave him the lease, you wanted this security?

A. Before I gave him the lease.

Q. I thought so. It appears, then, you did not give him the lease, or did not ask for that security until Thanksgiving Day—is that correct?

A. No, sir—after Thanksgiving Day—when I was up in the Riley Law Building, where I delivered the lease and got the money.

A. You delivered the lease to him up in the Riley Law Building?

A. Yes, sir.

Q. How did it come, then, that the lease was dated about a month before that—October 29, 1925?

A. Let me see the lease, and then I will explain it to you. (Referring to lease.) I prepared the lease a little ahead, expecting him to come in, so that I would have it ready for him, like I usually do.

Witness my hand at Wheeling, West Va., this 16th day of February, 1926.

Mrs. Sophia C. Bachmann, Assured.

[fol. 28] STATE OF WEST VIRGINIA,
County of Ohio, ss:

February 16th, 1926.

Personally appeared Mrs. Sophia C. Bachmann, signer of the foregoing statement, who made solemn oath to the truth of the same, and that no material fact is withheld that the said Company should be advised of.

Subscribed and sworn to before me the day and date above written. J. Wilbert Johnson. (Seal.)

STATE OF WEST VIRGINIA,
County of Ohio, ss:

Earle M. Giesey, residing in Wheeling, W. Va., most contiguous to the property hereinbefore described, hereby certify that I am not concerned in the loss or claim above set forth, either as a creditor or otherwise, or related to the assured or sufferers; that I have examined the circumstances attending the fire, or damage as alleged, and that I am well acquainted with the character and circumstances of the assured, and do verily believe that the assured has by misfortune, and without fraud or evil practice, sustained loss and damage on the property insured to the amount of Fourteen Thousand, Five Hundred, Fifteen and 10/100 Dollars.

In testimony whereof I have hereunto set my hand and official seal this 16th day of February, A. D., 1926.

Chas. G. Gally. (Seal.) My commission expires Aug. 4, 1933.

(NOTE.—This certificate should not be acknowledged before an agent of this Company acting as an officer of a Court, Justice of the Peace or Notary Public.)

Schedule "A"—Statement of Loss

Put nothing here except what assured actually agrees to and signs. All other statements and reports should be separate from proofs.

Joists & Floors

First floor 30 pcs. 2″x14″x22′	
Second " 123 " 2″x14″x22′	$960.54
Third " 123 " 2″x14″x24′	
Fourth " 50 " 2″x12″x24′	428.30
Roof Rafters 120 " 2″x12″x24′	
Hauling above from R. R. cars	80.00
Roof sheeting—3400 Ft.	188.50
First Floor Flooring 1″x4″—3400 Ft	298.00
[fol. 29] Second Floor Flooring 1″x4″—3400 Ft.	
Third Floor Flooring 1″x4″—3400 Ft.	812.00
Fourth " " 1″x4″—1400 "	
480 pcs.—1″x6″x12′ for floor trussing	162.40
9 " 2″x12″x16′ stair carriages	
2 " 2″x12″x20′ " "	68.30
156 linear Ft. 2″x10″ Step material treads	
400 Ft. T & G 1″x6″ sheeting around pent house	68.22
22 pcs. 2″x6″x12′ around pent house	
Cornice—65 linear Ft. 1″x12″ white pine	
" —60 " " 1″x6″ " "	31.13
12 Kegs nails	55.50
Second Floor front—3 plank window frames 30″x36″, 2 lts, 8½″ jam-s complete with sash & glazing D. S. A.	62.75
Second Floor rear—3 plank window frames 30″x30″, 2lts, 8½″ Jam-s complete	
Third Floor Front & Rear—6 plank window frames 30″x30″, 2 lts, 8½″ jam-s compl.	161.00
Fourth floor front—3 plank window frames 30″x28″, 2 lts, 8½″ jam-s complete	55.25
32 pcs. 1″x10″x10′, #2 White Pine	
1350 linear Ft. 1″x10″x10′, #2 White Pine	145.92
340 " " 1″x2″ #2 " "	

Partitions

First floor offices—beaded ceiling, 1″x4″, 2″x4″, 2 doors	125.00
Second Floor offices—beaded ceiling, 1″x4″, 2″x4″, 1 door	110.00
Third Floor offices—beaded ceiling, 1″x4″, 2″x4″, 1 door	100.00
Carpenter labor	2942.03

Q. That is, the lease was prepared and dated October 29, and he did not actually come in and get it until Thanksgiving day, is that right?

A. He came after Thanksgiving Day.

Q. You told Mr. Guiher the lease was signed in the Riley Law Building?

A. Yes, sir, after Thanksgiving Day."

Since testimony above (during noon recess) I have examined my bank deposit book and check book to refresh my recollection as to the dates. These books show the exact dates the cash payments were made to me by Bill Varisca. I find that Varisca paid me the $350.00 on October 16, 1925—I was mistaken when I said September. The books show that Varisca paid me $1,400.00 at the Riley Law Building on November 30, 1925; $350.00 being for December, 1925, and three months rent in addition as a guarantee. The sum of $1,400.00 was deposited in the Bank on November 30, 1925, as shown by the bank book, and the lease and [fol. 40] key were actually delivered to Varisca on the same date. The $350.00 paid on October 16, 1925, was rent in advance for the month of November, although no lease had then been drawn up. The $1,400.00 payment on November 30th included December rent of $350.00 and the lump sum of $1,050.00 as security.

It was on October 16, 1925, that I agreed to lease the building to Varisca. He then paid me the rent in advance for November. Then I had to have the lease prepared and it was not ready until October 29, 1925. I did not give the lease to him on that date, because he didn't come in; I did not see him until November 30, 1925, and it was not signed by Varisca and myself until November 30th. It was actually signed at the office of my son Carl in the Riley Law Building. Varisca first came to see me about leasing the building about the middle of September, 1925, and before we actually agreed upon the lease he came two or three times in person and telephoned me at l-ast half a dozen times. I estimate that he called me by telephone five or six times. Varisca made these personal calls and telephoned me because I did not give him the lease at first. I had been talking with the Carey Roofing Company and Mr. McGregor about leasing the building to them. I was asking both the Carey Roofing Company and McGregor $350.00 a month as

rent. McGregor told me he would see me again about a lease. Mr. Harry Meyers was the man in charge of the local office of Carey Roofing Company; he came to me in September, 1925, and asked the rental price, which I told him would be $350.00. He said he would have to submit the proposition to the regular rental agent of the company in Cincinnati. This rental agent actually came from Cincinnati two or three weeks later. In the meantime, I was holding Bill Varisea off until I found out whether I could lease the building to Carey Roofing Company. I held Varisca off approximately thirty days in order to give Carey Roofing Company a chance to get the lease. I was giving the preference to Carey Roofing Company, rather than to Varisca or McGregor, because I knew them; they had an established business, and they wanted a ten-year lease.

When Varisca came to see me about the lease, I asked him who he was and where he was from. He replied that he was [fol. 41] in the wholesale grovery business in Martins Ferry, Ohio. I told him that I did not know him, but he replied that he knew me and used to buy lots of goods from me, referring to the wholesale produce business which I had been engaged in in Wheeling for about forty years. Between November 30, 1925, and the time of the fire, I went down to the insured building and tried to get in a dozen times or more when I was with someone else. Also, I usually went to the brokerage office once or twice a day, and as I went by the building I would look in and shake the door. Sometimes I was by myself and at other times with other people. At no time between November 30, 1925, and the time of the fire, when I went to the building was I able to get in, nor could I see anything by looking in the door.

The Carey Roofing Company had their engineer go down to look at the insured building. I deny that after they looked it over they offered me only $250.00 for it. Carey Roofing Company never declined to take the building, but they did not get it because I had already leased it to Varisca and would not wait any longer for them. The payment which I got from Varisca was the cash payments which he made me, $350.00 on October 16, 1925, and $1,400.00 on November 30, 1925. I was in the insured building last at Thanksgiving time, 1925, on or about November 26, 1925. I am positive that I was never in the building again until

after the fire on December 27, 1925, and I am just as positive about that as I am of the rest of my testimony.

Thereupon the following questions were propounded to the witness and answers returned by him upon cross examination:

"Q. You observed from the lease this morning that you reserved the right, in the lease, to the office on the third floor, and the right of ingress and egress to that office, and to use the elevator in the building to get there? You remember that, don't you?

A. Yes, sir.

Q. Now, Mr. Bachmann, you tell the jury, if you delivered all the keys to Mr. Varisca, how you expected to make use of that reservation in the lease?

A. I did not expect to make use of it at all, other than if I needed a paper or something, when the people was in [fol. 42] there, to go through when they were in there, to get in the safe and get out what I wanted. I took out all the papers I thought I needed, but later Dr. Hersey and I had some deals on, and I couldn't find the papers, and I thought they were there, and we tried a number of times to get in, to get those papers, and was unable to get in.

Q. With all that big building, and with your right to use part of it, and with your papers and furniture in there, that you did have there, you didn't keep a single key?

A. No, sir, I took all my active papers out. Mostly storage stuff was in there."

At this point, the plaintiff rested her case.

Thereupon the defendant, to maintain the issues on its part, introduced testimony and evidence as follows:

GEORGE A. HASTINGS

Direct examination:

I have lived in Wheeling, W. Va., since 1891. Engaged in business as merchandise broker since 1894 in and about Wheeling. Have known Charles F. Bachmann, the plaintiff's husband, ever since I have been in Wheeling. I recall

when the Bachmann building at 1312 Main Street in Wheeling burned. I was then in Michigan on a holiday visit, having left Wheeling on Monday or Tuesday preceding the fire. On the day that I left Wheeling for Michigan I saw Charles F. Bachmann coming out of the front door of the building at 1312 Main Street. It was rather a cold morning, and as I came down Main Street about ten a. m., Bachmann came out of the front door of the building; I met him there and we walked to 14th Street together. As he came out the door he locked it and put the key in his pocket. I met him just as he came out the door and we walked on down Main Street and I wished him a Merry Christmas and parted. The fire occurred on Sunday, and this meeting with Bachmann was on the Monday preceding the fire. If the fire occurred on December 27, 1925, I saw Charles F. Bachmann come out of the building on Main Street on December 21, 1925.

[fol. 43] Cross-examination:

I met Mr. Bachmann coming out of the building a little before or after ten o'clock in the morning. The weather was cold or rather chilly, I don't remember clearly whether there was any snow or ice on the ground, or whether clear, cloudy or rainy. I had gone from my office in the National Exchange Bank Building and was going down to the Neill Grocery Company and other merchandise houses, as I do each morning. I don't recall anyone besides Mr. Bachmann whom I met on that trip. Bachmann locked the front door of the building by turning the key over and then put the key in his pocket. I did not see the key. I had never been in the Bachmann building so as to have occasion to open or close this door. I do not know what sort of a lock was on the door or whether it required the turning of a key to lock it. Mr. Bachmann and I talked generally, as two men would who met on the street and I left him at the corner of 14th Street, wishing him a Merry Christmas. I went on down Main Street and Bachmann went up toward Market Street. I left for Michigan on the Detroit train, either the same evening or the following evening. Since I have been subpœnaed as a witness in this case I have not tried to inform myself as to the exact date by making any examination. I returned from Michigan about two weeks later, around January 9th to 11th, 1926. I have told somebody that I passed

by the Bachmann building on the opposite side of Main Street and saw Mr. Bachmann shaking the door and didn't know whether he was going in or coming out.

On last Saturday morning Mr. Henry Elig talked to me about this matter. Elig asked me what, if anything, I knew about this Bachmann fire insurance case which was coming up for trial. I may have told Elig that it had been so long I did not know or remember anything about it. I said this because I did not consider that Elig had any right to ask me such questions, knowing that I was subpœnaed as a witness. He had my name and some other names. I did not tell Elig that the reason I did not answer his question, except as I did, was because I had been subpœnaed as a wit-
[fol. 44] ness. I do not know what kind of a lock was on the front door of the Bachmann Building.

Re-direct examination:

I did not see the list which Mr. Elig had, but know that he had such list because he mentioned some of the people, Elig wanted to know how I got in with Prince, Furbee and Doerr and the prohibition element generally. Elig was formerly in the grocery business with Neill Grocery Co., and Speidel and we have been old friends. Elig approached me on the street and asked me about the matter. I received my subpœna to testify on behalf of the defendant in this case one day last week. Since the subpœna was served on me, I did not think I should talk of it. When asked how many people approached me about it, he replied:

"I wouldn't know that anybody had made a dead set approach to know what my testimony would be. Anything that did come up, came in a casual conversational way."

W. L. Smith

Direct examination:

I have been engaged in the automobile business in Wheeling for sixteen years; have been acquainted with Charles F. Bachmann, plaintiff's husband, for about forty years. In 1925, I was renting a property from Charles F. Bachman located at 2209 Main Street in Wheeling. About the first

of December, 1925, I was endeavoring to get a reduction in rent on the property from Bachmann and was also discussing a renewal of the lease until the following May. Our negotiations or conversation about this lease took place at Mr. Bachmann's Office on the third floor of the Bachmann building on Main Street in Wheeling in the first part of December, 1925.

Cross-examination:

My conversation with Mr. Bachmann aforesaid took place in the building on Main Street after December 1, 1925, and [fol. 45] not later than December 10, 1925. I am able to fix these dates because some time after the fire I was called before the Federal grand jury here and at the time I took particular pains to go into this matter and I had some records which fixed the date definitely in my mind. I was asked to bring these records before the grand jury in connection with some case and in that way I was able to fix the date as in December, 1925—"not anywhere close to Christmas."

I had rented the property at 2208 Main Street from Bachmann for ten or twelve years prior to 1925. The lease was sometimes one year, sometimes two years, and sometimes two years with an option. Before the expiration of the renting period, I would have a conversation with Mr. Bachmann about renewing the lease and this happened a good many times during the period of ten years and I was in his office on many occasions. Last time I was in Bachmann's office was at the time I have stated above in December, 1925. I do not recall that I was ever in Mr. Bachmann's office in the Riley Law Building and I don't remember of going there in December, 1925, to talk to him about a renewal of my lease. I am positive that I talked to Bachmann in his office in the insured building on Main Street in the first week of December, 1925. When I first went in the office on that occasion there was some one else there and who went out, there was no one in the office except Bachmann and myself and we were discussing the renewal of the lease. I went in the building by the front door, which was open, and then up the stairway to the office. On the first floor of the building I saw a man sitting in a chair at the back of the building. He would usually be there when I went to the building and would tell me to go on

up to the office or go up with me. "He was the fellow who always brought the rent bill around." So far as I could see, the first floor of the building was empty at that time. After going up the stairway to the second floor, I had to walk some distance to get to the steps to go on up to the third floor. I don't remember seeing anything on the second floor at that time, it being rather dark there and very little light, but the stairway could be seen. The stairway was perhaps thirty feet back from the front of the building. I could see across the second floor to the bottom of the steps leading up to the third floor without any trouble. I [fol. 46] was not looking for anything on the second floor and saw nothing that I can remember; if there had been anything there I think I would have seen it. I saw no boxes or barrels or anything of that kind on the second floor.

On one of my visits to Bachmann's office, I saw some men working on the third floor but don't know what they were doing; but am not sure this was on my last visit. I was there a number of times not far apart. The workmen appeared to be putting up a partition on the third floor—at any rate it looked like a partition. This work was being done about twenty feet back of the stairway, or approximately fifty feet back from the front of the building. It seemed to be built about one-half or one-third of the distance across the room and was not yet finished. This partition went up from the floor, but I do not know whether it went all the way to the ceiling.

Bachmann's office was on the third floor, in the front. I would not say that this partition was being built on the third floor at the time of my last visit there. I do not know whether there was a fourth floor. When I went into Bachmann's office, there was some one whom I did not know but he immediately went out. I saw nothing on the third floor except the men working. I remained in the office about twenty-five minutes talking about renewal of the lease and about the purchase of a car and then left. As I came out of the office, I would face toward the rear of the building and had a full view over the whole length of the floor back to the rear, if there was nothing obstructing

Q. You had full view for the whole length of the floor back to the alley, didn't you?

A. Yes, I think I could have if there wasn't anything obstructing.

Q. What was there obstructing? You saw nothing but a partition a third way up. What else? If there was nothing obstructing, you could see clear back to the alley, couldn't you?

A. I don't remember whether I could or not.

Q. Why couldn't you?

A. I don't know.

On leaving the office, I would have to walk fifteen or twenty steps before starting down the stairway. I don't recall seeing anything on the third floor except the men [fol. 47] working there and I am not positive that men were working at the time of my last visit in December, 1925. As I came down the flight of steps to the second floor, I would have had a clear view of the whole of the second floor back to the rear, but I don't know that I looked back, as I had no reason to look. As I went down the stairway from the second floor to the first floor, I had a clear view of the first floor, but don't remember that I saw anything there.

I have nothing by which I can fix the exact date of my visit in December, 1925. I know it was after the 1st of December, 1925, because I checked the date up very carefully before going before the grand jury. Today I looked over the records of the grand jury—it was true at that time. I never knew Charles F. Bachmann was in the Riley Law Building, and do not recall ever having a conversation with him in that building or leaving it. Charles F. Bachman spoke to me last Saturday in one of the brokerage offices; he said something about this case which was coming up for trial but I do not recall exactly the nature of his remarks. I told Mr. Bachmann that I did not know what I was subpœnaed for, as I did not think that I knew anything about the case, and I still don't think I know anything about it. Also, I talked with Mr. Garden, one of the plaintiff's attorneys, and likewise told him that I did not know why I had been subpoenaed, because I knew nothing. I don't think yet I know anything particular about this case. I am absolutely sure that at the time of my said visit to Mr. Bachmann's office in the building on Main Street it was not in November, 1925, but was during the first week in December, 1925.

At the time of my last visit to Mr. Bachmann's office in December, 1925, I am quite certain that I saw in the rear

part of the first floor the man who brought me the rent bills from Mr. Bachmann. I don't think this man went upstairs with me to the office.

MRS. ELLA WEIDNER

Direct examination:

I was working for Zarnits Brothers Grocery Company in Wheeling in 1925. They occupied the building on Main [fol. 48] Street in Wheeling next to the Bachmann building which burned on December, 1925. I worked on the second floor of the Zarnitz Brothers building in December, 1925, and usually went to work about seven-thirty or eight o'clock in the morning. In the fall of 1925, when the windows were open on the second floor of the building, I very often smelled the fumes of liquor. This occurred during the working hours of the day. It would be various times—I could not specify the time. I do not recall whether I smelled the odor of liquor in December, 1925, as the windows were then closed, but before I closed the windows in the fall of 1925 I used to smell the liquor all along.

Cross-examination:

I do not recall when I closed the windows on account of cold weather. We had warm weather along in October and the closing of the windows depended on the weather. If it was cold, I kept the windows closed, and if it was warm I raised them. It was pretty cold in December. I do not know where the fumes of liquor were coming from. I smelled the fumes at different times.

We would joke and say, "If you want a sociable jag come and get a smell". This was some time in the afternoon. This was during the fall of 1925, but I could not say what month or whether early or late in the fall. I feel positive that I did not smell the fumes in December, 1925, because I think the windows were then closed.

Redirect examination:

When the windows were open I would smell the fumes of liquor and when the windows were closed I did not observe the odor.

At this point, counsel for plaintiff moved the court to strike out all of the evidence of the witness Mrs. Ella Weidner and to instruct the jury to disregard it.

The court for the time being withheld its ruling upon the motion.

[fol. 49] ELMER FADDIS

Direct examination:

Age 36. Has been a city firemen at Wheeling for four years and was a member of the Wheeling Fire Department in December, 1925. I was one of the first firemen to get to the Bachmann building on Main Street at the time of the fire. I went into the building by the rear door on the first floor. The door was not locked. I do not believe it was over fifteen minutes from the time we left the fire station until I had a line in the Bachmann building. The fire was upstairs on one of the upper floors. There was no fire on the first floor except what was falling down the elevator shaft. I was not able to get up the stairs. There was very little fire—mostly smoke. In being asked whether there was considerable fire, he said: "No, sir, it was all flames."

Cross-examination:

Ashby Jackson and myself were the first two firemen who reached the fire. Ashby drove the truck and I put the first line into the building. I do not know whether the windows in the back of the building were intact as I did not look at them. The elevator shaft was up towards the front part of the building. There was no fire in the front part of the building except the little bit coming down the elevator shaft. I could not get up the stairway as it was all on fire, so I turned around and came out in the alley. Then I took the hose and went on the roof of the building. The stairway was at the front, across from the elevator shaft.

Redirect examination:

It was an awful cold day. I remember because I was all froze up and could hardly move.

[fol. 50] STIPULATION—WEATHER

At this point, it was stipulated by counsel for the plaintiff upon the record that at the time of the fire, the thermometer was two degrees below zero.

Thereupon, counsel for the plaintiff, moved to exclude all of the testimony of the witness Elmer Faddis and to instruct the jury to disregard the same. The court for the time being withheld its ruling upon this motion.

MRS. AUGUST W. FORSCH

Direct examination:

Has resided in the City of Wheeling for about twenty years and lived there in December, 1925, at the time of the fire in the Bachmann building. I lived at No. 25 14th Street. The rear of the Bachmann building was close to the building in which I resided—I think there were possibly two stores between us. From our house, I could see the back windows of the Bachmann building. I was standing at our back window when the Bachmann building was burning. Prior to the time the fire was discovered, we heard three or four explosions, but I cannot state where they were at. One of these explosions jarred the building in which we were living, the other three were not so heavy. I don't know who turned in fire alarm. My husband first saw the fire. I can't remember just how long these explosions occurred before my son went to turn in the fire alarm.

Cross-examination:

When the explosions occurred, we didn't pay any attention to them at that time. It was then probably between four and five o'clock in the afternoon, though I don't remember exactly. I fix this time because my husband west to the kitchen about five o'clock to look at the dinner which was on the stove and the explosion occurred before he went to the kitchen, and I am positive the explosions were before [fol. 51] five o'clock, but I cannot say how long before. My husband sent my son to turn in the alarm. I did not.

I think there were at least four of the explosions. There was first one explosion, and then an interval and the other three came closer together. I am unable to say what interval elapsed between the first explosion and the last. The interval could not have been so very long; it could have been five minutes or longer. "I could not say any definite time." I don't know where the explosions came from. The explosions sounded muffled at a distance—like it was a great distance—but you couldn't tell much about it. The Bachmann building was almost next to our kitchen.

Redirect examination:

One of the explosions rocked the house in which we were living.

MR. AUGUST W. FORSCH

Direct examination:

I was living in the City of Wheeling in December, 1925. I am the husband of the preceding witness. The rear of the Bachmann building is approximately 80 to 100 feet from the building in which we were living. There are possibly two buildings in between. My wife and I were home on the afternoon of the fire. I think that I was probably the first person to discover the fire. I went to the rear of our building and looked out and saw the smoke. I saw "the windows come out of the rear of Mr. Bachmann's building". I saw the windows of the Bachmann building puff out from the heat, I presume it was. The windows I am speaking of were on the second or third floor of the rear of the Bachmann building, at least above the first floor. I sent my boy out to turn in the alarm.

Prior to the time of my discovery of the fire, I heard something in the nature of an explosion. It was a distant rumbling sound, like the backfire of a motor or an explosion. It seemed to come from a distance. It shook our building somewhat. This was earlier in the day, probably around four o'clock in the afternoon.

[fol. 52] Cross-examination:

It seemed to me that there were about four explosions or rumbles. There was first a rather loud report and then three minor reports. I presume that this was about four o'clock. It was just about five o'clock that I discovered the fire because I looked at our clock. Just about an hour elapsed from the time I heard the explosion until I discovered the fire and smoke.

Thereupon counsel for the plaintiff moved the court to exclude all of the testimony of the foregoing witnesses, Mrs. August W. Forsch and August W. Forsch, and to instruct the jury to disregard the same. The court for the time being reserved its ruling upon this motion.

GEORGE B. HEIDE

Is the person is charge of police of Wheeling Steel Corporation at Benwood. In 1925 was a Federal Prohibition Agent and at that time had been such agent for four or five years, located at Wheeling, West Virginia. Continued to serve as such agent until May 1, 1928. Recalls the fire in the Bachmann Building on Main Street on December 27, 1925, and immediately thereafter made an investigation at said building in my official capacity as Federal Prohibition Agent. On the day following the fire, I made an investigation between four or five o'clock in the afternoon. I then went to the rear of the building with Alonzo Price, then a Deputy Commissioner of Prohibition of the State of West Virginia, and Jesse McGill, a Deputy Sheriff. There was a ladder at the rear of the building by which we ascended to either the second or third floor. I am not sure which. About 25 or 30 feet from the rear of the building, to the front of the building, we found three moonshine stills of approximately 150-gallon capacity each. We got two of the stills out that evening between four and five o'clock, and as it began to get dark, we left the other still there. "We could see there was another still there, but it seem- there was a lot of timber covered with ice. The two stills removed were taken to the County Jail. We also saw about forty or fifty barrels—that looked like the floor fell down [fol. 53] just in the rear—containing mash. On that first

day, we took out the two stills and the lead lines, that is, the two pipes that run from the boiler down into the coil. We did not take any of the tanks out at that time as it got dark and we had to quit. The interior of the building at that time was pretty well covered with ice and timber, and was pretty well wrecked.

We went back to the building again the following morning; I think Mr. Alonzo Price, Mr. Bradley and Mr. Ritz, the Fire Marshal, went with me. About nine o'clock that morning we got into the rear of the Bachmann Building downstairs and there found 25-five gallon cans of gasoline. "There was a building, just sort of, it might have been an office building" a partition, on the other side there was some corn sugar, but I do not recall the amount thereof. We took these cans to be gasoline, as it smelled like it, but I did not open any can. I was called away on another investigation, and was not in the Backmann Building after that.

When I was at the building on Monday afternoon after the fire, I did not find any arrangement or apparatus of any kind for the heating of the moonshine stills, nor did I find any such on Tuesday. On Tuesday morning, we entered the first floor of the building from the rear. We found the gasoline first on the basement floor—the first floor—in the rear on the alley. Then we looked a little further and, as I recall, there was sort of a little office building or partition between where we found the gasoline and where we found the corn sugar. There was a considerable number of bags of corn sugar, but I do not recall the exact amount. This corn sugar was the kind ordinarily used in the manufacture of mash.

Some time before the date of the fire at the Bachmann Building, Mr. Alonzo Prince and I were in the immediate vicinity of said building, and smelled mash. Thereupon counsel for the plaintiff moved to strike out this answer of the witness, which motion was resisted by the defendant. The court sustained the motion to strike out said answer for the time being, and instructed the jury to disregard the question and answer, to which action of the court the defendant duly excepted. The Court further held that the defendant had the right to put this witness on later.

[fol. 54] In the week preceding the date of the fire I had been in the immediate vicinity of the Bachmann Building two or three times. We were in that vicinity for the pur-

pose of making investigations, as we had smelled the odor of mash in that neighborhood during the seven days next preceding the fire. We searched some buildings in the immediate vicinity of the Bachmann Building. We searched a furniture store, the name of which I forget at present.

The witness having been asked why he searched the furniture store, and objection having been made by counsel for the defendant, which objection was sustained by the court, and to which the defendant excepted, the following proceedings were had at the desk of the court, and outside of the hearing of the jury.

(The witness, answering without the presence of the jury, answered as follows):

"A. I searched the furniture store. We thought we smelled the odor of mash in that vicinity. We went down and smelled through some other place, and we searched, and we didn't find anything there.

Mr. Furbee: On how many occasions did you detect a smell or odor of mash——

Mr. Bachmann: We object. You are going into another question now.

Mr. Furbee: Let me finish:—within the seven days next preceding the date of the fire.

Objection. Sustained. Exception by defendant.

Mr. Furbee: I mean in that immediate vicinity.

The Witness: Now, that is just a little hard. That has been quite awhile ago. I know two or three occasions we were there. I will say that. I feel confident we was there on two or three occasions, and I know we smelled mash there, but to draw down to conclusions, I can't just say.

The Court: Can you say how long before the fire these occasions were?

The Witness: Only my statement the first time. That is as near, Judge, as I would like to answer.

[fol. 55] The Court: State it again.

The Witness: A week or two.

Mr. Furbee:

Q. How close is the furniture store that you searched to the property known as 1312 Main Street?

Objection. Overruled. Exception by defendant.

A. This furniture store is either the second or third door below the National Bank of West Virginia.

Mr. Bachmann: The furniture store that he has reference to is over a full block and a half away from 1312 Main Street? Being next to the National Bank of West Virginia it is about 1218 Main Street.

Mr. Furbee: It is approximately a half block.

Mr. Handlan: It is three-quarters.

The Court: How far is the furniture store in question from the Bachmann building that was burned, Mr. Heide?

The Witness: Your Honor, I would say it was a block at least.

Objection sustained. Exception by defendant.

Mr. Furbee: The defendant excepts to each one of the objections.

The Court: You will have just what you put on the record.

Mr. Guiher: If the Court please, we ask that each of the questions and answers taken in the absence of the jury, and out of the hearing of the jury, be read to the jury.

Mr. Bachmann: To which we object.

Objection sustained. Exception by defendant.

The jury here returned to the courtroom.

The gasoline and sugar which I testified about was found on the first floor of the Bachmann Building in the rear.

[fol. 56] Cross-examination:

I got to the Bachmaan Building the next afternoon after the fire about four o'clock. The building was then pretty well wrecked. "All the other floors had fallen down toward the center, except in the rear." We went into the building on a ladder and it seemed to me we went up to the third floor. I do not remember two ladders there. There was a ladder in the alley in the rear of the Bachmann Building which went up right by a window. After getting on the window sill I had to step down on to the floor a distance of approximately three or four feet. The third floor was not intact clear up to the front of the building. The third floor was intact inwards about 25 or 30 feet from the back wall.

"I do not think we went down on the second floor that night. The next day we went only on the first floor. I do not recall whether I was ever on the second floor.

Q. Do you recall there was a part of the second floor hanging,—maybe a little more hanging of the second floor, —a little bit more than the third floor,—do you recall that?

A. I though- from appearances it looked to me like it was a loft—half a floor.

Q. That may be true, but answer this question: Do you remember the second floor part of the flooring was hanging like you describe hanging on the third floor?

A. It seems to me that at that time—that was the only time that I was on there—it was just where I found the hole. We went in a window, as you said before,—I thought the third floor. The way I looked at it, it looked to me as if the building had shifted,—dropped down and piled up.

Q. Dropped down toward the center?

A. It seems to be like one end of it fell down.

Q. Do you remember the condition of the second floor?

A. It has been so long I can't just remember."

From what I saw in the rear of the first floor, where we found the corn sugar, the first floor was in pretty good shape. "I believe part of the first floor had fallen in the basement—some distance from the door."

We found the remains of the stills about 30 feet from [fol. 57] the rear wall of the third floor, about the edge of the place where the rest of the floor had fallen in the center. It was a little closer to the south wall than it was to the north wall.

"Q. Was that a complete still——"

"A. We could see when we went in there, there was part of a still and ice over some of it."

It was turned up, as if the embers had fallen down and knocked it over. I just judged that the still contained about 150 gallons, but I do not like to say that it held exactly that.

By "boiler", I mean a big copper still about five feet high. It seemed to me like one of the stills was mashed a

little, but I am not sure about the first one which we found. We didn't find anything in the first still. The other still which we removed was close together with the first one and seemed about the same size. It was also a copper boiler, and I think one of the two was mashed a little bit. The lead line with it was about three or four feet long and was about an inch pipe. I can not say whether the pipe was connected with the boiler. We removed the two boilers at that time on Monday, and saw what we thought was another still covered with ice, but did not take it out at that time. As I remember, this still was a little closer to the wall, but I do not know the size of that boiler, because it was all covered with ice. I think I saw the third still afterwards at the jail. We did not attempt to remove this third boiler, because it was getting dark and we had to get out, and I never assisted in getting it out later.

I can not say whether any still was in operation in the Bachmann Building at the time of the fire, but I know it was there when we got there. I did not find gasoline on Monday when the stills were found. I did not have the liquid analyzed which I thought was gasoline, but I smelled it and it smelled to me as though it was gasoline. I do not want to swear absolutely that there was gasoline in the 25-five-gallon cans which I saw on the first floor in the rear. There were 25 cans of five gallons each; they were square cans, about the kind we usually see as liquor cans. They were tin cans, and I don't think they had any wood around them.

[fol. 58] As you went in the rear down on the first floor of the Bachmann Building, there was a little platform; you stepped down from this, and the cans were setting along the rear wall—setting lengthwise along the alley on the inside of this wall. If you would look in a window, you couldn't have seen them. This is all I saw regarding what I believed to be gasoline. It was on Tuesday, the second day after the fire, that I saw the tin cans on the first floor. We made the search for the stills on Monday. The fire was on Sunday.

Redirect examination:

The only things I helped to take away from the Bachmann Building were the two boilers or stills.

Examination by Judge Baker:

The copper boilers were about 25 or 30 feet from the east side of the building. The cans were probably 20 or 25 feet below where the floor had dropped in towards the alley. I can not say just where the copper boilers had been set before the fire, as they may have been knocked around by falling timber. As I remember, one of the boilers was in pretty bad condition; it seemed to me that a timber or something had fallen on it. We did not take out any coils from the stills the first night, as I remember. I did not remove any the next morning. I cannot say that we found the boilers connected with the worm. We took the two boilers and threw them down from the floor to the ground; when we threw them down I didn't see any mash or water come out of them. I don't remember seeing any mash or anything of that character in the boilers when we first found them. I *I* didn't examine the inside of the boilers as to whether there were any remains of mash sticking around; it was pretty cold and we didn't waste much time. As we threw the boilers down, I did not see anything run out.

I did not find any burners or other method of heating the copper boilers at that time, nor did I at that time find any gasoline or gasoline cans at or about the location of the boilers. I don't think I looked at the boilers later at the jail until I went with some college professor, a chemist, in order that he could look at the boilers. I did not see [fol. 59] anything in the two boilers which we took out to indicate to me that they had contained mash at the time of the fire.

J. J. Doerr

Direct examination:

Is a Federal Prohibition Agent, and has occupied that position for about ten years, including 1925. Recalls the fire at the Bachmann Building on Main Street on December 27, 1925. I arrived at Wheeling the night following the fire, Monday, December 28, 1925. Went to scene of fire on Tuesday morning about ten o'clock, accompanied by Alonzo Prince, George B. Heide and two others. We found the

building entirely burned out excepting the rear end. The first part of the second and third floors was still hanging on. On the third floor, I found a still, about 100 gallon capacity, and three burners; three gasoline compressing tanks and about sixty barrels. I examined the contents of these barrels and part of them were full of mash—grain and sugar mash. The still which I found was a complete one, that is, it had a boiler and a connection from the boiler to a coil, condensing coil. Then there was a gasoline burner and a gasoline tank, with an air pump attached, so as to compress or force the gasoline from the gasoline tank to the burner under the still. Two of the gasoline tanks which I f-und were complete and intact; the other had the top blown out. I examined carefully the gasoline tank with the top blown out; the top of it was completely blown off—torn off. The tanks were about thirty inches high and about ten inches in diameter. The complete still which I helped and assisted in removing from the ruins consisted of about 100 gallon capacity boiler—brown copper boiler. The top of it sloped up to a neck, with a cap at the top. From the top of the still there was a copper connection leading a distance of about four feet from the top of the still to the condensing coil. The condensi-g coil was placed in a galvanized tank of about twenty gallons capacity. The still was upon a hot-plate, operated by a gasoline compressing tank, or rather fed from a gasoline compressor tank. The method of operation of such a gasoline compressing [fol. 60] tank is about as follows: The gasoline is placed in the gasoline compressing tank. The tank is then filled with air from a pump, an air-pump something like an automobile pump, which is attached to the tank. There is a gauge on the gasoline tank, and also a valve and a connection with a small lead pipe leading from the gasoline pipe to the burner under the still, and in that way the compressing tank will feed the fuel to the burner in an even manner. The gasoline goes to the burner under the pressure made possible by the air pump into the gasoline tank.

The top or head was blown off of one of the gasoline compressor tanks. I examined the other two compressor tanks and they contained gasoline. They were not full of gasoline. We found a five-gallon can on the third floor of the Bachmann Building, within about ten feet from where the still set. I examined the contents of this can and

it contained gasoline, the can being about two-thirds full. I also made an examination of the first floor of the Bachmann Building, and in the rear of said floor we found about 25 five-gallon cans of gasoline; also five or six sacks of corn sugar and four or five sacks of grain-rye.

I made an examination of the stills which were found in the Bachmann Building. The boiler of the still contained about ten gallons of rye and sugar mash. I also examined the barrels found on the third floor of the Bachmann Building, and they contained about sixty barrels of rye and sugar mash. Not all of the barrels were full; probably twenty-five were full. The mash was ready for distillation. I examined the other two stills, and on one of them the upper rim of the still was blown out, bulged as though it had blown out, the copper being torn.

From my experience as a Federal Prohibition agent, covering a period of ten years, it takes about seven days ordinarily for mash to come to the point that it may be distilled and liquor made from it. That is, I mean that from the time the mash, the sugar, grain, yeast and water are put in the barrel and kept at a warm temperature, it will be ready for distillation in seven days.

Cross-examination:

There were approximately sixty barrels of mash in the Bachmann Building and about twenty-five barrels were [fol. 61] full. There were about thirty-five empty barrels, in which there were some charcoal and debris that had fallen from the roof. Apparently they were used barrels; several of them were partly burned, apparently from the fire—that is, the tops of them were burned. These barrels were located to the rear of the third floor, and toward the east wall, possibly ten feet from the wall. The third floor was partly burned away and the barrels were right at the edge of where the floor still remained. A good many of the barrels had fallen down to the second floor and then to the first floor. The barrels which had fallen down were empty but I can not state how many. The filled barrels were the ones closest to the wall. Some of the barrels were along the south wall, close to said wall; the others were more in the center of the floor, rather bunched together. As I recall, there was a space between the barrels—two rows. The

stills were very close to the edge of the burned floor, that is, near the edge of where the floor had been burned off, and were more toward the middle of the floor than the barrels.

The three stills were sitting in a row. The third one was about in the middle of the floor and the two others extended south toward the south wall. I believe that the stills were located approximately twenty feet from the east or rear wall of the building. The barrels were set in rows, two barrels together; there was space between and then another row of barrels. The stills were about three feet apart. I tested the mash and ascertained exactly what it was. I stirred the mash up and poured some out from several of the barrels. Later, probably the following week, we emptied all of the barrels.

The week after the fire, the temperature was warmer than at the time of the fire. There was ice in and upon the Bachmann Building for a long time. That is the reason we did not get the stills out sooner, because it was covered with ice, and we had to wait for it to thaw. I was not present when the first two stills were removed, but I was present when the third one was taken out. The third still was taken out sometime the following week.

I did not examine any of the adjoining buildings. The adjoining building to the south was badly damaged. A wholesale business had been carried on in said building. I did not make any examination of this adjoining building or either of the adjoining buildings; I only examined the [fol. 62] Bachmann Building. I went into the basement of the Bachmann Building in the elevator shaft and examined that. I do not know of any corn, sugar, grain or anything of that kind being gotten out of the adjoining buildings. An examination was made of the adjoining building, but I did not do it.

I believe that I was in the adjoining building on the south probably a week or ten days after the fire, and there was some sugar, corn and rye found there.

Q. Mr. Doerr, are you familiar with the containers that are used by the oil company, and particularly by the Freedom Oil Company, that they deliver and keep their grease and lubricant in,—copper containers about that high, in circular form? Have you ever seen any of those?

A. I don't recall.

So far as my investigation of the Bachmann Building was concerned, I did not go any further than finding the stills and the gasoline. Whatever else was done was done by somebody else.

I recall there was a part of the floor of the building which was not entirely destroyed and resembled an office room. I recall seeing some safes there, but don't know how many. There were also desks and a chair. I don't recall that they were damaged much. What was left of the second floor of the building was just merely hanging there—apparently just sticking in the wall and sagging down—I know it was dangerous. This condition obtained almost from the front to the rear of the second floor and the third floor was about the same way, though it seemed to stand up a little better than the second floor. There was not much difference between the third and second floors. The roof was entirely burned off.

Most of the empty barrels which I saw were pretty badly burned both inside and out. However, I recall that some of the empty barrels were still up on the third floor and had the appearance of being used for mash.

GEORGE J. KOSSUTH

Direct examination:

Is a photographer at Wheeling, West Virginia. Is handed two photographs and identifies them as having [fol. 63] been taken by the witness in the jail yard at the County Jail of Ohio County at Wheeling. A gentleman took me down and pointed out the things which they wanted photographed and these were the photographs which I took at that time. The photographs were taken on May 11, 1927.

Thereupon, the two photographs examined by this witness were identified by the Reporter as Defendant's Exhibits Nos. 2 and 3, respectively.

Cross-examination:

There were at least two men with me when the photographs were taken. I am not sure whether or not one was a state policeman.

Direct examination:

Age forty-eight, and resides at Follansbee, W. Va. Is Deputy Commissioner of Prohibition for the State of West Virginia and has held such position for about eight years. Before becoming Deputy Commissioner he was a Federal Prohibition agent working out of Washington, D. C. Recalls the fire at the Bachmann building in Wheeling, and following said fire, made an investigation as Deputy Commissioner of Prohibition. My first visit to the Bachmann Building was on Monday, the day following the fire, when I went there with Federal prohibition agent Heide and two newspaper reporters. There were some firemen still guarding the Bachmann building when we got there, and we went up the fire ladder standing at the rear of the building to the third floor. We found three stills on the third floor.

It was a very cold day, and had been very cold for three or four days preceding the fire and for two or three days thereafter. When we got there on Monday there was a lot of ice about the building; the front of the building was a solid glare of ice from roof to sidewalk. The three moonshine stills which we found on the third floor of the Bachmann building were approximately eight feet apart, and were located about twenty five to thirty feet from the [fol. 64] rear wall of the building. The ladder brought us up to a window at the rear of the third floor, about the middle of the building. About twenty feet from the rear wall, straight in front, was the first still. Another still was located about eight feet away, against the south wall of the building, and the third still was located about thirty feet from the rear wall, the third still being seven or eight feet toward the front from the first still that we came to.

On Monday after we had located the stills, we tried to get them out and found that they were connected up with the cooling tub and coil. I went down the ladder to one of the fire wagons and borrowed a wrench and then went up and unscrewed what we call the goose neck or lead pipe, from the coil over to the still, and disconnected the still from the cooling tank. It was absolutely impossible to move the cooling tank, as it was frozen in. The first still we got to contained some mash, and we drained that

through the pet-cock on the bottom. The mash in the still was not frozen, and it drained out through the drain cock at the bottom.

No. 2 still was the furthest one over. It had the top blown off of it—almost off. This still contained frozen water—ice. After we got it back where we could work, I took a piece of lead pipe and pounded the ice out of the still. We got the two stills, throwed them out the window, called the patrol wagon and hauled them to the county jail. These two stills were connected up with the apparatus at the time we went there. We took the two stills down to the jail—that is, just the two copper boilers which constitute the still proper. We had to empty them to get them out of the window. One of the boilers had no mash in it, but did have frozen water. The boiler which had the top partly blown off was the one which contained the ice.

After this first visit, I think we went back to the Bachmann Building about every day for ten or twelve days. I went back the following day with Mr. Heide and Mr. Bradley and Mr. Doerr. This time we visited the rear of the first floor of the building, and there found 25 five gallon cans of gasoline. I examined these cans and opened some of them. They were regular square cans, "not quite square", being what we term as square alcohol cans. On [fol. 65] the other side of the partition from where the gasoline was found, there was some corn sugar and some empty corn sugar sacks. There had not been much fire on the first floor.

I participated in the removal of other apparatus found on the third floor. After the thaw came we got a firemen's ladder and went up to the third story and got out the burners, the air compressers and the other, third, still, and took the third still and coils and the air compressors to the county jail. The burners were destroyed right there on the floor. I examined the third still and found that it contained mash. It was drained and then taken to the county jail.

By word "compressor" used above, I mean the tank that they pump the air into the gasoline over to the burner. There is gasoline in this tank, and then they put air in and force the gasoline over under the burner. There were three of these compressors, one for each still. The three

compressors were connected with the burners, which furnished the heat for the still. The gasoline compressors were connected to the burners, by a little copper hollow wire or two, the purpose of which is to permit the flow of gasoline from the compressor to the burner.

The gasoline compressor that was found near the south wall was in perfect condition, that is, the gauge and the valves were all intact. The compressor used with the first still which was found when I went into the room, had the tops broked off of it. The compressor for the third still, the one furthest to the front of the building, had the top blown entirely out of it. There was gasoline in two of the compressors, being the one next to the south wall, and the one found on entering the building. The gasoline compressors had a capacity of between twenty and twenty-five gallons. There were between eight and ten gallons of gasoline in the compressor next to the south wall, and the other one had between three and four gallons. The compressor which had the end off of it contained nothing except frozen water. I helped to take these three compressors to the Ohio County jail. The three compressors were kept at the jail until along in the latter part of December, 1928. Sheriff Henderson then instructed me to clean everything up, as it was near the end of his term, and I got rid of the stills and the compressors. Photographs of the three com- [fol. 66] pressors were taken at the jail in my presence. I exhibited them to some professor who came from the University at Morgantown.

Thereupon the two photographs hereinbefore identified as Defendant's Exhibits Nos. 2 and 3, were shown to the witness, and he stated that he was present when the photographer Kossuth took the pictures. The witness further stated that at that time Kossuth took photographs of the three air compressors which were taken from the Bachmann Building. The witness further stated that he was requested to go to the jail to get the compressors out of the vault, and that he did so, and further stated that the three compressors were in the same condition at the time the photographs were taken by Mr. Kossuth as they were when removed from the Bachmann Building, except that they had become a little rusty by the time the photographs were taken.

Thereupon, the two photographs hereinbefore marked for identification as Defendant's Exhibits Nos. 2 and 3 were offered in evidence by the defendant, to which the plaintiff objected. The Court overruled the objection, to which ruling the plaintiff excepted as to both of said photographs, and they were thereupon introduced in evidence as hereinbefore identified, and the same are now incorporated in this record and shown below:

NOTE BY DISTRICT CLERK.—The originals of Defendant's Exhibits Nos 2 and 3 accompany this transcript of record by reason of District Court order (page 164 of this transcript.)

In my years of experience in the Prohibition Department, I have had reason to examine and inspect a considerable quantity of moonshine stills, though not so frequently lately. In my eight or nine years with the Prohibition Department I have inspected hundreds of stills. The three stills found in the Bachmann Building were all of the same size and of the same design, and each had a capacity of about 150 gallons. The stills were approximately five feet tall up to the point where the top goes up into a sort of a cone. Then there is a sort of little condenser on the top [fol. 67] where the feeds line goes out. The stills are, I would say, about two feet and a half or three feet thick, and about five feet high, and then there is a five foot lead pipe which leads off from the top of the still over to the cooling tub which contains the coil. The stills sit upon a hot plate which has burners under it, and then there is a feed line which runs from the air compressor to the hot plate. The gasoline is gotten from the storage or compressor tank to the hot plate burner under the stills through the tube which leads from the air compressor to the burner. The air pressure put in the compressor tank forces the gasoline over through sort of a little hose. It is a little hollow copper wire, or small like wire, and the air forces the gasoline through this little pipe over to the burner. Then all you have to do is to light the burner which is the same as if you had natural gas. The air is what forces the gasoline over and makes the heat. The air is pumped into the gasoline tank with a foot pump or hand pump "just *as* the same as you pump up an automobile tire". Apparatus of this

character was found in the Bachmann Building, and the air pump was found connected with the air compressor, and we found it over near the south wall.

Thereupon, the witness was asked from his years of experience in the Prohibition Department and from his investigation of moonshine stills what was the usual type of heat used in operating such stills, to which question the plaintiff objected, and the Court sustained said objection and refused to permit the witness to answer the question in the hearing of the jury, to which action and ruling of the Court the defendant duly excepted. Thereupon, out of the hearing of the jury, the witness answered the question as follows: "Around this part of the country, it is generally gasoline" The jury then returned.

In addition to the mash found in the copper stills on the third floor of the Bachmann Building, I observed mash in barrels there. There were about sixty barrels of fifty gallons capacity each. In addition to the gasoline found in the two compressors on the third floor, I found one five gallon can of gasoline over near the still next to the south wall. I brought this can of gasoline to the Federal Building and kept it in the vault on the fourth floor for quite a long time, then finally I took it and put in in my car and [fol. 68] used it. This was a square alcohol can and was the same type of can as the twenty-five cans which we found on the first floor.

Mash was found in two of the three copper stills. From my experience in the Prohibition Department, the length of time required from the time a mash preparation is begun until it is ready to be run into a still is about five days. The process is warm water first is placed in a boiler then fifty pounds of corn sugar, if you are going to make corn sugar mash, and is allowed to soak, and then yeast, and two or three handfuls of rye grain are used, and in some instances a little bit of carbide is used to hurry the fermentation in case it is to be gotten out in five or six days. Ordinarily, the preparation of mash takes between six and seven days. (Counsel for plaintiff objected to the questions and answers involved in the foregoing paragraph regarding

the preparation of mash, which objection the Court overruled, and to the Court's ruling the plaintiff excepted.)

Prior to the fire in the Bachmann Building I had not observed or found any evidence of moonshine stills operating in that immediate vicinity. (Plaintiff's objection to question evoking this answer was overruled.) I had observed certain unusual odors pertaining to moonshine mash in that vicinity. I had observed the odor of mash coming very strongly from the sewer at the intersection of junction of 13th Street and Main Street about the first part of December, 1925. The Bachmann Building is located at 1312 Main Street, and this was on Alley 13, at the corner of 13th Street. I presume that all of the buildings run into that sewer. I checked on this odor by moving from one place to another in the vicinity and always traced the odor back to this one place. I went to the corner of 14th Street, and did not get any odor there, and then I came up to the corner of 12th Street, and likewise did not get the odor. I presume the entire section there drains into that sewer. I judge it was approximately 250 feet from the place where I detected the odor in the sewer to the back of the Bachmann Building. (Plaintiff objected to all of the testimony of this witness narrated in this paragraph and the court sustained said objection, and struck out said testimony, [fol. 69] and each part thereof, to which ruling of the court the defendant duly excepted.)

Cross-examination:

I have sat in the courtroom during the trial of this case and heard the other witnesses give their testimony. I was requested to remain in the court room by counsel for the defendant. I have received no remuneration from the defendant insurance company, and do not expect to. At the request of Mr. Burbee, who at that time was attorney for the defendant insurance company and also assistant United States Attorney, I helped take photographs of the gasoline condensers.

It is still the custom of Prohibition officers, after making a raid, to make out a written statement of what we find on the premises searched, in the way of stills, and intoxicating liquors. After our search of the Bachmann Building I made such a report to the Prohibition Department at

Charleston, West Virginia. I do not have the statement here because it was sent to Charleston. I have in my pocket my own notes showing what was found at the Bachmann Building at the time of the search—it is in a regular daily diary which I keep.

Thereupon, the witness produced the said diary and at the request of counsel for plaintiff read to the jury the following entry therefrom, under date of December 28, 1925: "Heide and McGill raided 1312 Main Street. Found three 150 gallon stills; 50 pounds of mash."

I have other records from which I have refreshed my recollection with respect to the testimony given in this case. I don't know where the record is now, as it has been some time since I read it over. These matters have been in my memory ever since, because there was a case involving these facts pending until just a short time ago. I have also looked at the records or reports of Mr. Heide regarding our search in the Bachmann Building, not for the purpose of refreshing my recollection, but in order to see what he had in his report. This had nothing to do with my testimony here today.

A few days ago I talked with Mr. Carl G. Bachmann, one of the counsel for the plaintiff, at the United States [fol. 70] Marshall's office in Wheeling. He asked me about a five gallon can of gasoline which I had found and taken out of the Bachmann Building. Also, I talked to Mr. Carl G. Bachmann about this same five gallon can of gasoline yesterday and the day before. The first time I talked with Mr. Bachmann I did not tell him that I did not know what had become of the gasoline. I told him that I had taken it upstairs in the Federal Building, but did not say I did not know what had become of it.

Whereupon, the witness testified also as follows upon cross examination by Honorable Carl G. Bachmann, one of counsel for plaintiffs.

"Q. Didn't you tell me on yesterday when we talked about that same five-gallon can of gasoline, that you had since refreshed your recollection from your notes, and you found that you took it and used it in your automobile,—didn't you tell me that yesterday?

A. Absolutely, I did not. Carl, I told you right there—you was asking me about that gasoline, and I said, "Carl, I will have to tell you. The five-gallon can of gasoline"—you was going to spring something on us about these twenty-five five-gallon cans. That is what you told me. You said, "I will show you".

Mr. Bachmann: Answer my question.

The Witness: Wait until I get through. You said, "I will spring something on you". I said, "Carl, if I were you, I would not mention anything about the gasoline. The fact is the five gallon can, I used it in my automobile, and I know that it is gasoline". Then you changed your tune.

Q. What do you mean changed my tune,—explain yourself.

A. You didn't say that you was going to spring that surprise.

Q. I didn't bring it up until you brought it up.

A. Of course, you didn't not now.

The Court: Never mind the controversy between yourself and Mr. Prince.

Mr. Bachmann: Then I understand you swear here now that you never told me in there you had taken the five-[fol. 71] gallon can of gasoline and you didn't know what became of it, and the second time, that you looked up your notes and found you used it in your automobile?

Objection.

A. No, sir.

Objection overruled."

I did not see any stills operated in the Bachmann Building after Thanksgiving Day, 1925, nor do I know, of my own personal knowledge, that any stills were operated there between Thanksgiving time and the day of the fire. I do not know whether there was any gasoline in the building any time after Thanksgiving up until the night of the fire. The stills were there the day following the fire, but of course I would not know whether there were any in the building on Thanksgiving Day, 1925, or up until the night of the fire. We had a warrant for the search of the Bachmann Building and went down there on Monday afternoon

following the fire, around two or three o'clock. We had with us the warrant which we had obtained from Squire Kindelberger. As soon as we got there we went to the third story, which is the only floor we worked on that afternoon, because after we had worked trying to get the stills out on the third floor it started to get dark on us. We were not on the first or second floor that afternoon. There were timbers over on top of the stills and one of the stills had frozen ice in it so that I had to pound it out. I had to come back down the ladder and get a wrench and go up and take the connections apart. Part of the roof that had not burned, was laying down on top of the stills, and a great deal of ice. We didn't have any axe, but we took an iron pipe that we found there, and dug out around the apparatus. The roof which had fallen down was not on all three of the stills, because one of them was out toward the edge where the whole floor was gutted out, and there was not much roof or timbers on that still. This particular still was laying over on its side against some of the timbers, that is, the boiler part. The floor and timbers were under it, the burner being off to one side. The compressor was attached to the burners, but we did not find it on that day. This was the boiler which had the top blown out of it, that [fol. 72] is, it looked like it was blown out. The top was blown out though I don't know how it was blown out, nor do I know whether it was in that condition before we got there. This boiler was hanging almost over the edge of the floor, and we found a burner and condenser right by it. The condenser was attached to the burner, and a coil was attached to the boiler. The goose nesk was attached on to the coil that was buried in the tub containing the coil. I looked inside of this boiler and found that it contained ice and frozen water and nothing more. We took the boiler and the goose neck to the jail but not the burners. We did not take anything else connected with that still to the jail that afternoon, because it was frozen in.

The other still, in back of the one described above, had falling timbers and ice about it. We took it out that day. The roof was not on top of it but just some timbers that had fallen down. I looked at this boiler and it did not contain water, but mash. I drained the mash out. It was almost zero weather at that time. There was ice frozen around those stills from the water used by the firemen.

This still or boiler was about two-thirds full of mash. Mash may freeze if it is cold enough, but in all my experience I have never seen mash freeze. Mash contains water, grain, and yeast, and after the alcohol starts to form it keeps the mash from freezing. There must have been alcohol in this mash, because it didn't freeze. I poured the mash out. There was nothing connected with this boiler except the lead pipe going to the coil. Also, there was a burner underneath this boiler. The roof timbers had fallen on this boiler and it was sitting there on top of the burner. This boiler was not mashed very much and was in good shape. We did not have to cut the timbers out, but just lifted them away from the boiler. These timbers were about two by six.

The third still was back next to the south wall. The boiler contained mash, being approximately half full. The mash was not frozen when we got it out. We did not pour this mash out that day, because we did not get back to the boiler. It was sitting near the south wall, but was covered entirely by ice. There was no roof over this still. "The roof had burned out over the whole building." We could just see that the still was there and that was all. I did not know whether there was mash in this still on the first day we were there, but we got the mash out of it pos- [fol. 73] sibly a week or ten days later. The other two stills or boilers were taken out the first afternoon together with the goose neck and lead pipe. We didn't take the coils because they were frozen in the ice in the cooling tub and we could not get them out. The coils are inch copper pipe curled around in a galvanized iron tub containing about twenty or twenty-five gallons. We could not take out the coils because they were frozen in the ice in the tub and all of it was frozen to the floor. We took out the boilers and lead pipe the first afternoon and took them to the jail, and also took out a sample of the mash and brought it up to the Federal Building. The sample of mash was gotten from one of the barrels. The mash barrels were on the fourth floor in rear. "The mash barrels were not on the floor with the stills, but on the floor above."

"Q. Mr. Prince, don't you know there wasn't any fourth floor in the rear of that building?

A. No, sir, I don't know it.

Q. Don't you know that there were three floors in that building, and there was only a half floor on the fourth floor from the front end?

A. Well, the fourth floor was there. That is where the barrels were at, on the fourth floor.

Q. What was left of the fourth floor and third floor had all fallen in, hadn't they?

A. The biggest part of it.

Q. You went in from a ladder on the third floor, didn't you?

A. Yes, sir.

Q. And that was the top floor of that building from the rear?

A. That was part of the top floor, yes, sir.

Q. There wasn't any other floor in the rear of the building?

A. Where the barrels was was part of the fourth floor.

Q. In the rear?

A. Yes, sir.

Q. Is that where you found the mash,—on the fourth floor in the rear?

A. Yes, sir.

Q. And up over the top of where the stills were?

A. Yes, sir."

There was no roof over that back part. I think some of the mash barrels had fallen down in the basement. I saw these mash barrels on Monday. I could see them right in front of my eyes, although I was underneath. The [fol. 74] fourth floor did not extend back entirely to the alley in the rear. They were right over my head, above where the stills were; that portion of the fourth floor was still standing. I was down at the Bachmann Building the next day and made a further search. It was then that we found the gasoline cans and corn sugar. I did not see them the first day, because I was not on the first floor at all. The gasoline cans were on the first floor in the rear just as you went in the door from the alley. As we went down a step from the door the cans were along a partition sitting on the floor against the partition. There were twenty-five five gallon square cans. I examined the contents of about three of the cans and took it for granted that they were all the same. With respect to the three

cans, I took the tops off and put my finger in and tasted the contents. It tasted like gasoline to me. And I took it to be gasoline. I also found another five gallon can of gasoline upstairs on the third floor and after I had taken it up to the Federal Building, I examined it in the same way. I also took it to be gasoline. It was kept at the building probably six or eight months before I took it for my own use. I am sure that the can of gasoline which I put in my automobile eight months later was the same can which I took from the Bachmann Building.

In reply to the inquiry as to who gave him this can of gasoline, the witness replied that he took it himself.

At this point, the Court instructed the jury to disregard the conclusion of the witness Prince as stated in his prior testimony, to the effect that the top of the compressor was "blown" off, as it was a mere conclusion.

My duties required me to be out of the city frequently during intervals of days and weeks when I do not go to the city jail. Two of the stills were taken to the jail on Monday, December 28, 1925. I did not see them again until I took down the third still in a week or ten days later. I would go see the stills in the evidence room whenever I went down there, which would sometimes be five or six times a week, and then sometimes I would miss a week or two. Most of the stills that I have taken in raids are stored in the jail yard, but these three particular stills [fol. 75] were stored in the evidence room, that is, in the dungeon room down in the cellar. The deputy sheriff carried the key to this room. I frequently went to this room because I would be taking samples of whiskey and mash down there for storage. I marked these particular stills by tags which were hung on the handles of the stills, but there was nothing marked on the condensors to show that these were the condensers. The condensers, of which the photographs in question had been taken, are the same ones which I put in the jail the day I put the stills in there. I put them in the room and took them out. The compressors which have been photographed look to me exactly the same as the ones I put in there, and I don't see how they could get out and someone substitute something else. "It could have been done, but I didn't hardly think I was working with men of that type". In addition to the three

boilers and compressers we took the three coils and goose necks to the jail. I am sure that the apparatus photographed was the same that was taken out of the Bachmann Building.

The burners were not taken to the jail because they were too heavy and too big and awkward to get out. I did not take them or the gasoline pump or any of the other apparatus to the jail, because I didn't think it was necessary. The compressors were made of galvanized sheet iron and the boilers of copper. (When witness speaks of "condenser," he meant "compressor".)

Redirect examination:

When I went down to the Bachmann Building on the day following the fire, several firemen were still there, and when — went down again on Tuesday, there were still firemen about. With regard to the twenty-five 5 gallon cans of gasoline found on the first floor of the building, I tried to unscrew the tops off of some of the cans, but did not have strength enough to do it. I then kept fooling around until I found three cans that I was able to get the tops off with my fingers without a wrench.

Thereupon, the witness was handed the photograph identified as defendant's Exhibit No. 3, and was asked to describe the purpose of the apparatus appearing on the top thereof. The witness stated that one of the projections is the air gauge to tell the amount of air in the tank. An-
[fol. 76] other is where the gasoline goes through the little lead pipe to the boiler. Another is where the air hose is fastened on to allow air to be pumped into the tank. Another is a little screw valve that is screwed off in order to fill the tank with gasoline.

The witness then produced sketch which he had prepared himself in order to better illustrate the position where he observed the sixty barrels of mash. Counsel for plaintiff objected to the use of said sketch by the witness in his testimony, but the Court overruled the objection, and the plaintiff duly excepted. The witness stated that he prepared the drawing himself, and that it represented the Bachmann Building in his recollection.

The sketch was thereupon identified by the reporter as Defendant's Exhibit No. 4.

The witness stated that he had marked on this sketch the relative location of the barrels of mash and the three moonshine stills. He stated that the location of the three stills was marked with the word "stills" and that he had made little circles on the sketch to represent barrels. The witness stated further that the fourth floor or half story of the building did not extend back to the rear of the Bachmann Building any further than the place where the still- were located.

Thereupon, the witness stepped before the jury, and by pointing to his sketch indicated the relative positions of the stills and the barrels of mash, in the following words:

"This is just a rough sketch that I made up in my office this noon. This is Main Street going down here. This is the front part of the Bachmann building. This is the alley. This is the rear part of the Bachmann building. This is the doorway that came in onto the first floor, down three steps on the first floor of the Bachmann building. This is the second floor of the Bachmann building. This is the third floor of the Bachmann building. This is the fourth floor. Now, this was all gutted out, clean up here, and the roof entirely gone. This floor did not extend clean back to the alley, but it extended to right over where these stills [fol. 77] were located and found on the third floor. This floor had been all burned away, clean through to the roof, but the joists coming through the walls had held a portion of this floor up that had not been burned out on either side of the building. This floor here had been burned out from this point clear to the front where the office part had been. The office was intact. There had been no fire in the office, because the doors were still swinging on hinges to the office, but the balance of the building had all been gutted clear over to this point where the third still was found, which I classed as No. 2 still. No. 3 was against the south wall. This is No. 1. The barrels of mash was on this portion of the floor, and a portion of the fourth wall was still hanging there from the fact that the timbers coming out of the wall held this part of the fourth floor up."

"On the still or boiler where the top is fastened on to the main bowl of the still," it "is riveted around the top and then soldered". A portion of this top, approximately a foot and a half in lenght, had apparently been torn. It was all jagged and rough, "showing that heat had not cause- it."

Objection to latter part of answer and witness was instructed not to draw conclusions.

It was all jagged where the tear was on the still. Part of the lid or top of the still was still hanging on it. And in regard to the condenser where the top was soldered and riveted, the entire top was gone, and the top of the condenser or air compresser was all jagged in one or two places where there were prejectiles, probably a half inch or three-quarters of an inch above where the rim was. You could see where the rivets had been. The holes where some of the rivets had been were torn out.

By referring to the photographs identified as Defendant's Exhibits Nos. 2 and 3, the witness stated that the top of the compressor shown therein represented the condition that he has been trying to detail.

Recross-examination:

The mash barrels were found on what I have always termed the fourth floor of the building, although it does not extend entirely back to the rear. What I mean is that this fourth floor comes back from the front of the building [fol. 78] about two-thirds of the length of the building. There was no floor on this fourth floor from the rear wall of the building.

The witness then marked an "x" upon the sketch, showing how much of the third floor remained after the fire.

The part of the third floor remaining was directly under the part of the fourth floor as I have indicated on the sketch. At the front end of the building, there remained just about the area of the office. That office is about eight or ten feet wide and about 10 feet long. Just a small part of the second floor remained at the rear, and I have marked an "x" on my sketch showing that point. I judged that about ten or fifteen feet of the second floor remained from the rear and I have marked an "x" on this sketch showing the remaining part in the rear. "This part up here toward the front was all burned". Speaking of the remaining portion of the first floor in rear, witness says, "on one side you could walk along up to the elevator shaft, on the lower side of the building". Second floor all destroyed from point marked on diagram over to front wall. The center part of

the first floor was all gutted out. The part remaining of the first floor was close to the front door and along the side by the elevator shaft. On the north side where the st-ir-way was it was all burned out, and down into the basement part of the center part of the first floor was burned out. The following questions and answers ensued:

"Q. So part of the center of this first floor had been burned out?

A. Yes.

Q. There was some little on the north side, and the north wall and south wall, and a little bit in the back?

A. In the rear, yes.

Q. The second floor from that point over to the front?

A. Yes.

Q. Indicate to the jury where you stook on the third floor when you saw the mash barrels.

A. Right here on this floor, between the window and the first still, and looked up and saw the mash barrels.

Q. Was not this floor burned?

A. All the balance of it was, but the part that was hanging by the joists.

[fol. 79] Q. This part of the floor from approximately twenty or thirty-five feet, from the front wall, had it been destroyed, and wasn't the rafters and timbers that held up the floor bent down like that, where they had been hanging after they were burned?

A. This part was all gutted out entirely."

The mash barrels were on the part of the floor that was still hanging from the joists that go through the wall. There were about fifty barrels, I do not know how many, but not all of them were filled. I did not go up to examine them, because one of the other boys brought down a bottle of the mash he got. I saw the boy go up and bring the mash down in a jar. He filled it out of one of the barrels, I did not go up on the fourth floor myself and therefore, cannot say how much mash was up there.

"Q. Didn't you tell this jury there were some sixty barrels of mash in that place?

A. Sixty barrels, I said.

Q. You didn't see any mash in there at all?

A. No, sir, not on the fourth floor, I didn't, because I never got up there.

Q. Were there any mash barrels any place else with mash in them that you saw?
A. No, sir."

All the mash from the barrels that I saw on Monday was what was contained in the jar brought back by the boy out of one of the barrels. This was on Monday.

SAMUEL MORRIS

Direct examination:

Resides at Morgantown, West Virginia. Has been a professor of Chemistry in West Virginia University since 1916.

It was stipulated that Professor Morris had had a complete technical education in Chemistry.

I have been called eight or ten times to testify at trials of moonshine liquor cases. I have had twenty-two or twenty-three years of laboratory experience in the teaching of chemistry and during that time have had occasion to handle and conduct tests with gasoline and other products of petroleum oil. I have made a study and investigation [fol. 80] of the use and handling of gasoline, and have studied the best and authoritative works upon that subject, including the work of the United States Bureau of Mines under the Department of the Interior. As an every day proposition in the chemical laboratory, I have conducted distillation experiments in connection with alcohol and other liquids.

Pure alcohol will freeze at about 170 degrees below zero, Fahrenheit. The freezing point of water is 32 degrees. The freezing point of gasoline is between 130 to 140 below zero. Gasoline is a product of petroleum oil and petroleum oil is made up of a large number of compounds—hydrogen and carbon that have different boiling points, and the petroleum oil is heated and these volatile constituents come off as gasses, then later light liquids, and as the temperature rises, the heavier liquids come off. In good alcohol the gases and lighter liquids are used for something else. Then they catch the same heavier oils. Of course, they are still light, and use them for gasoline. Then later, after the

gasoline is distilled off, come the kerosene oils, and then still heavier oils, lubricating oils, and paraffin. The chemical constituents of gasoline are carbon and hydrogen, about 80% carbon and 20% hydrogen. If gasoline vapors are mixed with a sufficient amount of air, the mixture becomes explosive. The percentage of the two vary somewhat. Burwell in his Bureau of Mines work, says in speaking of hazards in the use of gasoline, that between 1¼% gasoline up to 6% of gasoline vapor, the rest being air, will make an explosive mixture. Below that, and above that percentage of gasoline vapor it is not explosive. In causing an explosion of gasoline, the temperature of the mixture has to be raised sufficiently and a temperature of about 780 degrees Fahrenheit will explode gasoline vapor. That is what would be called a cherry red heat. It requires generally a flame or electric spark to start and ignite the vapor. Gill of Boston Tech in his little book on gasoline says it is on record that gasoline vapors have been known to have been ignited as far away as sixty feet from the point of explosion, and even in filling automobiles, a man standing in front has been known to ignite the fumes that come underneath the automobile or around it to the front of the car.
[fol. 81] Alonzo Prince and Mr. Heide, two of the witnesses in this case, took me to the county jail at Wheeling to examine certain tanks or apparatus, about August 20, 1927. There were three tanks there in the basement.

The witness was then handed the two photographs heretofore introduced in evidence identified as Defendant's Exhibits Nos. 2 and 3 and it was stipulated upon the record that the three tanks pointed out to the witness at the county jail were similar to the ones appearing in the photographs.

Thereupon, the following proceedings were had:

"The Witness: There were three tanks there, and one, in particular, had the top off of it, and all the connections were gone—the connections with the top of the tank. The other two—one of them was apparently in working condition, and the other one was not in working condition,—had some of the connections off of it.

Mr. Handlan: We ask that the part of the answer that there were some apparently in working condition, be stricken out. It is a conclusion of the witness.

Mr. Guiher: I will ask you, Professor, what you mean.

The Court: I will have to sustain the objection to the Professor saying that the tank is in working condition. He can describe what he found, but not draw a conclusion from that finding.

Exception by defendant.

Mr. Guiher:

Q. Professor, I will ask you to describe a little more in detail the appearance of the top of the one tank which you say had no cap or top left on it.

A. There were two stop-cocks on the top of the tank; then there was an opening with a screw cap on it. Knowing those tanks,—having seen them—I could see that the tank was out of the connection that those tanks usually have.

Mr. Guiher: I believe you perhaps misunderstood my question. In referring to the particular tank which I did, I would like you to explain now, Professor, the appearance [fol. 82] of the top of the tank which had the top or cap off of it entirely.

The Witness: That tank, like the others, had had a top. That tank, like the others, had been rivited around the top.

Mr. Handan: This is objected to. We move to exclude the answer.

The Court: He can say there were remains of parts of the rivits, but he cannot draw a conclusion that *he* had been rivitid.

Mr. Guiher: Just explain as near as you can, without concluding or drawing any conclusion.

The Witness: There were rivit holders around the top of the tank, and in one place a part of the cap underneath had been left with the other part—the main part of the tank, and at one place a little part of the cap stood straight up on the tank.

Q. Do you recollect whether the rivit was gone?

A. I don't remember whether the rivit was gone. It must have been held by the indentation of the rivit, at least, because part of it stood up."

I have with me here a compressor tank which is almost identical, with the exception of the size, with the tanks which

I examined at the county jail. The principle of construction involved is the same, but it is smaller in capacity.

Counsel for plaintiff objected to the witness bringing and demonstrating this tank before the jury, which objection the Court sustained.

Thereupon, the witness, at the suggestion of the court went before the jury and explained the working of the compressor tanks as follows, using the photograph exhibit for this purpose.

"These tanks have a stop-cock right here. This tank has an opening right here, to introduce gasoline. Inside that tank is a tube that runs well down to the bottom. Next, there is an opening here to compress air. If you unscrew that cap, you will find that it just goes through there. So that when air is forced through it will go to the top of the [fol. 83] gasoline, and you force with an ordinary automobile pump from the bottom of this tank. There is a small hollow wire, or it is a small feed pipe, to the end of which you can see right here. That wire goes right down and is connected up with this stop cock here. As you compress the air on the gasoline, probably half full, that gasoline flows up from the bottom—starts in at the bottom of this small tube through this stop cock, out through that small tube, to the gasoline burner, where it is burned. Here is an air gauge to show the pressure, so that you can tell what pressure you put upon that, by your automobile pump or bicycle pump.

The Court: How is the pressure put upon that gasoline?

The Witness: Generally by hand—a hand air pump. That is what the company usually furnishes, like a bicycle pump or automobile pump.

Mr. Guiher:

Q. Is this type of tank which you have described in this photograph, and pointed out to the jury, designed to be used with any particular kind of liquid?

A. Yes, with gasoline."

Thereupon the witness testified as follows:

"Q. Professor Morris, just explain the steps in a distillation process of alcohol or alcoholic products with re-

spect to such precautions as you have found are necessary to take in order to carry on the process with safety.

The Witness: Distillation of alcoholic products is for the purpose of separating the alcohol from the water,—at least partially so. Now, in the case of distillation, the alcoholic products, say, are in a container. That container is heated, and the alcohol is volatilized, and passes off. Tho collect this alcohol, there is an outlet with a tube on it which goes through some cooling device, generally running water, and there the fumes of the alcohol are condensed. As to the precaution-: One must always take them and must be very careful that the pressure in this apparatus does not get too high. If it does, the pressure can be relieved sufficiently through the outlet, or if the outlet becomes clogged, then, of course, like an ordinary steam boiler, it will explode, or it is very liable to. This may come about by too high tem- [fol. 84] perature. If you get too high temperature on your still, it will explode. If you get the outlet clogged, and continue your heat, it will explode."

Cross-examination:

I am a professor of Chemistry, but not of mechanics or mechanical engineering. I cannot say, on oath, as a matter of fact, that there was ever a top on the other compressor that compared with the tops on the other two.

"Q. I believe you gave the freezing points of alcohol. You also gave the heating points at which gasoline would explode or burn. You also explained that in order to cause an explosive mixture and combustion that it would require alcoholic vapor and air mixed together in certain proportions. Professor, if you were told that a building, about sixty or eighty feet in depth, and twenty-five or thirty feet in width containing wooden joists and wooden floors, and a wooden roof, took fire about five or six o'clock in the afternoon of a very cold day, and burned all that night and burned until the next morning,—if you were told that condition existed, and that in that building, upon the third or fourth floor, with the fire above and below, that there was a five-gallon can of gasoline there and there were these compressors half full of gasoline, what would you say should

have happened to that gasoline, and that five-gallon — of gasoline, based on your experience and knowledge of chemistry, and particularly of the explosive disposition or tendency of gasoline?

Mr. Guiher: I would be very glad to have Mr. Handlan ask this question, but he is making the witness his own witness. If the Court will recall, I did not inquire about these stills or how they exploded. I merely asked about the mixture.

The Witness: It would be ridiculous for me to attempt to say what would happen to a can of gasoline, unless I knew something of the temperature and how near it was to the fire. It would be ridiculous.

Mr. Handlan: I could not tell you — the temperature [fol. 85] would be of that building. I am asking what in your opinion would be the probably result of that gasoline.

A. I don't know the conditions sufficiently. If the fire burned underneath the gasoline can, I might be able to give you some idea about it then.

Q. Let me add this to the hypothetical question,—some of which is not yet in evidence: Assume, too, Professor, that the floors were burned out,—the second and third floors, either entirely or partially burned out; that the building had been used for the manufacture of candy and of oil products and grease products, for a number or years; there was this oily substance all over the floor, and the building began to burn about five or six o'clock one evening, and continued to burn until the next day.

Mr. Guiher: The question is objected to as not proper cross-examination.

The Court: Mr. Handlan, you may make the witness your own witness.

Mr. Handlan: I will ask him to remain at the conclusion of the present examination."

Gasoline and air will not explode under less than about 780 degrees Fahrenheit. This is what is known as a red or cherry red heat. In order to heat raw materials, such as limestone, manganese, etc., in a furnace, a temperature of around 2,500 degrees Fahrenheit is required. 780 degrees is not an extremely high temperature. If all the

wood in a building and the floors were burned, a temperature of 780 degrees could be reached. If the wood is not scorched, then I am pretty sure that the temperature was not cherry red heat, as the latter will burn wood.

If gasoline is contained in one of these compressors, the compressor itself would be air-tight if there were no holes in it and the stop cocks were closed. If the compressor functions properly it indicates that it is air-tight. If the stills were operating with the compressors as component parts it would indicate that the ones in use were functioning normally. One of the compressors shown in the photographs seemed to have all of its parts except the wire—that is, the wire leading from the top of the gasoline tank over to the burner. This wire has nothing to do with the compressor itself, because it was controlled and would [fol. 86] function, or not function, by the operation of the shut-off at the top of the tank. With the exception of this lead pipe I saw nothing wrong with this one compressor. It seems to be fully equipped, with the possible exception of the gauge. If this compressor had exploded, the top or something would certainly have blown off. With respect to the one compressor on the left which has the top on but with the caps and gauge apparently gone, it does not appear as though there was any explosion in it.

Gasoline has no definite boiling point because it is not made of definite substances. The boiling point runs a little below 100 as I remember. The boiling point of water is 212. It requires nearly twice as much temperature to boil water as to boil gasoline.

At this point counsel for defendant renewed its motion to have read to the jury the several questions propounded by counsel for defendant to its witness George Heide, as heretofore shown, and the answers made thereto, taken in the absence of the jury. The Court reserved its ruling upon this motion.

ALONZO PRINCE

Cross-examination:

I have prepared a diagram of the Bachmann Building, showing what part of the floors remained, and what part were destroyed by the fire.

The diagram or sketch was then produced, and it was identified as Plaintiff's Exhibit No. 7.

This diagram represents the conditions which existed in the Bachmann Building as near as I can tell, immediately after the fire.

Thereupon, the said diagram was introduced in evidence and identified as Plaintiff's Exhibit No. 7, it being as hereinbelow shown.

[fol. 87] NOTE BY DISTRICT CLERK.—The original of Plaintiff's Exhibit No. 7 accompanies this transcript of record by reason of District Court order (page 164 of this transcript).

Thereupon, the witness stepped before the jury and explained the said diagram identified as Plaintiff's Exhibit No. 7.

At the top are two lines marked "fourth floor" which represent all that remained of that floor, yet this floor did not extend all the way through the building. The part to the side marked "alley" was the end of this floor, and the part at the right marked "Main Street" is the part of the floor that was burned out, leaving that portion in the middle still standing. I would say that approximately twenty or twenty-five feet of the fourth floor was still standing.

That part of the third floor which remained is the portion shown on this diagram that protrudes out from the wall of the building marked "alley". About twenty to twenty-five feet of this floor remained, and all the rest had been burned out with the exception of the wall. The only other part of the third floor remaining was a little portion adjoining the Main Street wall of the building, probably about eight feet.

The only portion of the second floor remaining was a small portion attached to the back wall where it is marked "alley", probably about thirty or thirty-five feet. The balance of the second floor clear up to the front of the building on Main Street had been destroyed.

Practically all of the first floor remained with the exception of a small space near the north side of the building. The roof was entirely destroyed.

It was on the fourth floor where twenty or twenty-five feet remained, where I saw the barrels. On this third floor here is where I saw the three stills, and the five gallon can of gasoline. The can of gasoline was close to the wall. The portion of the floor on the south side of the building had not been burned quite as close to the wall as it did right in the middle. This can of gasoline was about ten feet from where the floor had fallen down.

[fol. 88] CHARLES F. BACHMANN (Recalled)

Cross-examination:

Is the same witness who testified before in this case.

Thereupon, the following questions and answers upon cross examination were had outside of the hearing of the jury:

Q. Mr. Bachmann, following the fire in the Bachmann Building on December 27, 1925, is it not a fact that you were indicted by a Federal Grand Jury of the Federal Court at Wheeling, West Virginia by the United States Government, charged with conspiracy to violate the National Prohibition Act, in connection with the operation of the stills found in the building by the prohibition officers?

A. Not shortly. It was several months afterwards.

Q. That is, you were indicted sometime after the fire?

A. Yes, sir.

Q. How long was that indictment pending here before the Federal Court, Mr. Bachmann?

A. About three years.

Q. It is my understanding that eventually the indictment was dismissed—nolled by the United States Government—is that correct?

A. Yes, sir.

Q. Mr. Bachmann, the prohibition officers never caught Bill Varisca, so far as you know, did they?

A. I don't know.

Q. You didn't see him again?

A. No, sir.

Thereupon, the said testimony of the witness having been taken out of the hearing of the jury, on account of

the objections thereto by counsel for plaintiff, the defendant moved that each of the foregoing questions and answers be read to the jury, to which the plaintiff objected, and the Court sustained the objections to each and every question and answer, and to which action and ruling of the Court, the defendant duly excepted.

In sustaining the plaintiff's objections to said testimony [fol. 89] the Court made the following statement upon the record:

"The Court: The Court takes judicial notice of what transpired at the various terms and recalls distinctly that from the time the indictment for conspiracy was found by the Grand Jury against Charles Bachmann and others, the defendants, at practically every term, if not every term, was in open court insisting upon a trial of the defendant, Charles Bachmann, the Government, through its District Attorney, on each occasion announcing it was not ready for trial, and insisting upon a continuance. It was called to the attention of the Court that this failure to grant the defendant a trial was contrary to all precedent, and was very seriously injuring Carl G. Bachmann, son of Charles Bachmann in his candidacy for Congress. Thereupon the Court announced that he would grant the Government one more continuance, and if the case was not tried at the next term, it would be dismissed by the Court for want of prosecution, on my own motion. At the succeeding term of court, with this understanding, the District Attorney came in and asked, on their own motion, to nolle the indictment. Which was accordingly done."

At this point the defendant again renewed its motion to have read to the jury the testimony of the witness George Heide heretofore taken out of the hearing of the jury, in regard to certain investigations made by him in the vicinity of the Bachmann Building before the fire. Plaintiff again objected and the Court sustained said objections and refused to permit the testimony of the witness to be read to the jury, to which ruling of the Court as to each question and answer the defendant duly excepted.

Thereupon, the plaintiff renewed its motion to exclude the testimony of the defendant's witnesses Mrs. Ellen

Weidner, Elmer Faddis, Mrs. August Forsch, and A. W. Forsch. The Court overruled the motion to strike out testimony and each part thereof, of said four witnesses, and to said ruling the plaintiff duly excepted.

At this point, the defendant rested its case.

[fol. 90] Thereupon, on motion of counsel for plaintiff, the Court instructed the jury as follows: relating to certain testimony of the defendant's witness J. J. Doerr regarding the fact that the top of one of the gasoline compressors had been "blown off":

"The Court: Gentlemen of the Jury: Any statement that Mr. Doerr or any other witness made, as a conclusion, that he drew from the facts and circumstances is stricken out. Any statement they made as to conditions as they found them, as they saw, as they existed, remains in."

The defendant duly excepted to this ruling and statement of the Court.

J. J. Doerr (Recalled)

Cross-examination:

All of the stills taken from the Bachmann Building were taken to the county jail. My recollection is that all the various appliances, the cooling tubs, coils, goose neck, and the long pipe that connected the coil up with the still, were taken to the jail. I was with Alonzo Prince when the last still and the boilers and cooling tubs were taken out. These were all imbedded in the ice and had to be cut out. At the time the three stills and the boilers were gotten out the ice had melted to some extent. I think we chopped our way through the ice with an old axe and got them out. The elevator was out of commission and the stairway destroyed. The stills and compressors were brought down by way of a ladder from the rear end of the building. I am not sure whether any of them were pushed out of the windows and dropped into the alley below; probably so. All of this apparatus was on the third floor.

I actually examined probably three or four of the mash barrels myself. They were on the third floor. I actually

examined about three of the gasoline cans. I did not see them all; they were all in the same room and I took the caps off of three of them. They had small caps of the screw type, about two inches in diameter. The cans were square tin cans of five gallon capacity about sixteen inches [fol. 91] high. I am not sure what arrangements there were on the cans for lifting or carrying them. In addition to the gasoline found on the third floor which was in the compressors, I saw the one can of gasoline which was found on the third floor and I examined it.

Thereupon, the plaintiff moved the Court to strike out and exclude all of the defendant's testimony and to direct the jury to return a verdict in favor of the plaintiff, which motion the defendant resisted.

After hearing the arguments of counsel, and taking time to consider, the Court overruled said motion and to said action and ruling of the Court the plaintiff duly excepted.

Thereupon the plaintiff to further maintain the issues on her part, introduced the following testimony in evidence in rebuttal:

A. S. WHITELY

Direct examination:

Is Secretary of the West Virginia Fire Underwriters Association, and has been for approximately twenty years. The insurance companies doing business in West Virginia have prepared and have in use for the instruction of their agents what is known as a Handbook of Rules, Forms and Deposits required by the West Virginia Fire Underwriters Association and the West Virginia Inspection Bureau. The witness was then handed a book which he stated was a book of requirements prescribed by the West Virginia Fire Underwriters Association for the guidance of the companies and agents in the writing of fire insurance and tornado business in West Virginia. The defendant St. Paul Fire & Marine Insurance Company as working under these rules and regulations in 1925. This book is required to be recorded in the office of the Commissioner of Insurance of West Virginia.

The witness then was handed the rider attached to the policy of the defendant company heretofore introduced in [fol. 92] evidence herein, and read a provision thereof as follows: "And for present and other occupations not more hazardous, and to do such work and to keep and use such materials as are usual in such occupancies."

Thereupon, the following proceedings were had during the examination of this witness:

"Q. Turn to rule 73 and read what that books says with respect to the particular sentence that you have just read in this rider.

Objected to.

Mr. Guiher: I do not know what this book is. I think the Court sees it is utterly irrelevant, when it is all in. I want to move to exclude at that time. I think it might be better to have the Court permit this witness to be examined, and then to have the motion to exclude all of it.

The Court: That is agreeable to the Court.

(The book referred to was handed to counsel for defendant.)

Mr. Guiher: This is subject to our objection. We are going to move to exclude it.

Mr. Bachmann: Will you read Rule No. 1 to the jury?

The Witness (reading:)

"Form No. 1. Privilege for present and other occupancies not more hazardous and to do such work and to keep and use such materials as are usual in such occupancies.

"Note.—It is understood that the word "materials" as used above, includes gasoline and such other materials as are prohibited by the printed conditions of the policy, when kept and used for such purposes as are usual to the occupancies permitted."

Mr. Bachmann: State whether or not the rider on the [fol. 93] policy which you now have before you is the rider that was in use by the three insurance companies that I mentioned, at and during the time in 1925?

A. That was the clause in use, and which was prescribed by us. I would not say it was in use by the insurance companies, but it was prescribed by us.

Q. The clause in the rider is the same clause that Rule 73 refers to?

A. Yes. This particular clause was in use at that time.

Mr. Bachmann: I now offer the rule itself in evidence, and ask that it may be copied, so that the original book may be returned to Mr. Whitely.

Mr. Guiher: If the Court please, we now move to exclude all testimony of this witness, including the tender of the book which has been offered."

The defendant also then moved the court to instruct the jury to disregard the foregoing quoted evidence of this witness and the parts of said books which were read to the jury as aforesaid. For the meantime the court reserved its ruling upon the objections of the defendant to all of the foregoing evidence of the witness. Later the court overruled the objection to said evidence and the defendant excepted thereto, as hereinafter shown.

DAVID TYLER.

Direct examination:

Resides at Wheeling, West Virginia, and is connected with the Tyler Iron Works, engaged in the structural iron and ornamental iron business. Has had about twenty years' experience as a draftsman in designing and drawing buildings. Since 1923, and 1924, has been in and about the Bachmann Building on Main Street approximately once or twice a week. Has prepared a sketch of the Bachmann Building, as near as I can remember it, showing the condition, at the time of the fire and immediately prior thereto, [fol. 94] of the various floors, the contour of the building, both front and rear.

Thereupon the witness produced two sketches which were identified by the Reporter as plaintiff's exhibits 8 and 9—Tyler.

These two sketches were prepared by me and show its condition just before the fire in December, 1925; they show the floor plans, elevation and cross-section of the Sophia Bachmann Building. Thereupon the sketches were passed

around among the jury These sketches were marked to show the first, second and third floors.

There was really no fourth floor of the building; we called it instead a loft, and I show it on these drawings. One could get up to the loft either by a ladder or by the elevator. If the elevator were out of commission, then it would be necessary in getting from the third to the fourth floor of the building, to go up the wood ladder. This ladder was straight and ran from the third floor to the loft floor along one side of the building; it was approximately twenty inches wide and about eleven or twelve feet high. So far as I know, there were no water connections on this fourth floor or loft. If there were sixty barrels upon this fourth floor, they could have been gotten up there by the ladder or the elevator. This fourth floor or loft extended from the front of the building on Main Street back to the rear approximately forty feet. The elevator was operated by electric power. I was in the Bachmann Building the day following the fire. At that time, the center portion of the building from the roof down was all down on the first floor. The front of the building, practically all the way up to the roof was up so a person could climb up to it, and a portion of the back of the building was in the same way so that you could climb up to it by means of a ladder. The portion of the floors on the west side of the building, the second and third floors, and part of the loft and part of the roof remained; that is, approximately twenty to twenty-five feet running from west to east. At the back of the building, I would say that there remained a portion of the second floor [fol. 95] and a little of the third—I would say from 10 to 20 feet. There was no fourth floor on the east side of the building.

The day following the fire I reached the Bachmann Building around nine or ten o'clock in the morning. I then went into the building and saw a heap of material through the center of the building; I went in to help get out Mr. Bachmann's office property, if any was left. I did not see any gasoline. I entered the building from the front on Main Street and climbed over a portion of the dirt and rubbish in order to see what we could do upstairs. I went back about a third of the length of the building, but did not go in the rear at all. In December, 1925, Charles F. Bachmann conducted his business in an office on Market Street—

over the Lyric Theater on Market Street. He did not conduct his business in the building on Main Street during the month of December, 1925; he moved out around Thanksgiving day. I fix this date by maturity of one of — notes made by Charles F. Bachmann and myself. In talking with Mr. Bachmann, about the 18th or 19th of November, 1925, he told me I would have to see him at his new office over the Lyric Theater on Market Street from now on. I had no occasion during the month of December, 1925, to attempt to get into the Bachmann Building on Main Street. There was a good, heavy lock, and a cylinder lock besides, on the front door of the building on Main Street. It had a cylinder or night latch. I would say that it did not require a key to lock this door; that is, the cylinder lock would not require a key to lock it, but the other lock would.

Thereupon, a lock was exhibited to the witness, and he testified that it was similar to the one at the front door of the Bachmann Building.

Charles F. Bachmann might have been up to the Riley Law Building after he moved out of the Main Street building. He might have gone up there to see his son, as his son had his office there. I think his son had the office there after Thanksgiving day, 1925.

No cross examination of this witness.

[fol. 96] JAMES J. MALONEY

Resides at Wheeling, West Virginia, and is engaged as a painting contractor and decorator. Is a member of the present City Council of Wheeling; and is familiar with Bachmann property on Main Street; was at the fire of the Bachmann Building on December 27, 1925. My attention was attracted to the matter by a young boy running down Main Street yelling "fire"; I then looked up the alley and saw smoke coming out of the Bachmann Building; I ran to the front of the building and looked in and tried to get in the doors. The doors were locked. Then witness parked car out of reach of Fire Department and ran back and by that time a truck and fire apparatus were pulling up. At that time the front of the building looked like a roaring

furnace. First place witness went, after jumping out of his car, was to rear of building. The reflection on the inside of the building was all over the place and it looked like the fire was shooting out the roof. I did not hear any explosions. I saw the reflection of the flames on the inside of the windows and the windows were not broken out when I first got there. I remained there from three to five hours, "at the building". The fire "was very, very hot, although it was a bitter cold night". Part of the time I could not stand in front of the building on account of the heat. At no time did I hear any explosions in the Bachmann Building or anywhere else. After I once went to the rear, I did not go back again. Firemen worked from front, back and on top.

The next morning after the fire, I went to the Palace Furniture Company's building which was located two doors above the Bachmann Building in which I was very much interested. The firemen were still on duty at the Bachmann Building "and people were afraid to go in". The building was still smoking. I went in the building as far as I could get giving the firemen coffee. "Two floors had caved in and the first floor bulged down". The roof and the next floor looked like they were all piled down on the first floor "where the roof had burned down, caved down, taking the next one and the next one, piling up on the next floor. The joists of the first floor looked like they had broken and gone down into the basement. Practically all [fol. 97] of the floors above the first floor were down and the first floor sagged down and looked like it struck the basement. I went in the building from the front on that morning but I did not go to the rear of the building. I did not see any gasoline cans on the first floor. I walked back from the front on the first floor as far as I could get to the place where the ice and water were piled up, handing a fireman a cup of coffee who was standing there squirting a hose down there.

While I was on the first floor I could see clear up through the building and I did not see anything that looked like sixty wooden barrels, either empty or filled with anything. I saw the roof go in from the Palace Furniture roof, on night of fire. In response to question as to what time witness showed boy how to turn in alarm, and first discovered, he answered "I would say half-past five or six o'clock in

the afternoon. It was on the Sunday following Christmas. I returned on the day following, that is, on Monday. I went to the building around nine o'clock in the morning.

Cross-examination:

The firemen were at the Bachmann Building all night. Witness has known Charles F. Bachmann for seven, eight or nine years, but has not spoken to him for three. When I could not get in front of the building when I discovered the fire, I went around to the rear at the alley. On the next day I went back on the first floor approximately twenty or twenty-five feet.

"The Court: From the front door?

A. Oh, no, I climbed up on that pile.

The Court: Were you ever on any of the other floors in back?

A. Oh, possibly a week after that—three or four days after that.

The Court: The next day you were not?

A. No, sir. That would cave in unless you had a ladder or something.

The Court: Do you know whether there was any floor standing in the back part?

A. There might have been a few boards on each side, or a few beams, that had not let go, or that might have broke in half."

[fol. 98] STIPULATION

At this point, it was stipulated by and between counsel for the parties that on the 27th day of November, 1925, the mail of Charles F. Bachmann was changed from 1312 Main Street in Wheeling, West Virginia, to the Riley Law Building in said City by directions given to the postmaster at Wheeling in writing and that thereafter the mail was delivered to Mr. Bachmann at 600 Riley Law Building.

ASHBY JACKSON

Direct examination:

Lives at Wheeling, West Virginia, and has been a member of the Wheeling Fire Department for thirty-four years.

Recalls the fire at the Bachmann Building on Main Street and attended it in my capacity as a fireman. The first fire company on the scene was the one of which I was a member. Elmer Faddis and Cahill were with me. My company began operations in the rear of the building on the alley. I should say that we got to the scene in about eight or nine minutes after the alarm.

"Q. What was the condition of the building in the rear as you discovered it when you got there eight or nine minutes after the alarm? What was the extent of the fire? How extensive and intensive?

A. When we got to Fourteenth and Market someone was standing out in the street. I was driving the truck. He waived me to go up the alley. I turned in the alley, stopped a minute for the boys to wrap the horse around the plug just below the alley. I drove up to the Bachmann building, and there was such a smoke and flames you could see inside through the windows and I drove past a little bit with the truck, so if anything happened, it would not burn the truck up, and pulled the hose out, and went into the rear doors. There was a big door and we forced those doors open and went in there. By the time we got in there one of the officers came in and said to me, "Go down to Fourteenth Street. They are having trouble connecting up". I came out and went down a few steps and met the [fol. 99] water coming in the hose. So I came back into the building then. We got in to about the elevator shaft, and the fire was falling down from the second floor. We tried to get up the steps, but the flame and smoke was so hot it forced us down. We had to go to the alley and go up over the roof on the upper side, through a window. We worked there awhile, and then got a big ladder up, and our company went into the second floor and we worked there the best part of the night."

"After the firemen got there, the fire seemed to increase for awhile, because it was so cold,—the water would freeze immediately into ice and we worked at a disadvantage for awhile. I never worked on a hotter fire. It was so hot it forced us down stairs and up toward the roof. We tried to get in the windows from the alley. I tried and spectators tried to break windows in with bricks so that we could get water on the flame."

I have been in the Fire Department thirty-four years and have attended a number of fires where there was gas or gasoline explosions in the burning building.

Thereupon the following question was asked this witness, over the objection of the defendant and answer returned:

"Q. What was the result on the windows where inside explosions occurred Mr. Jackson?

A. The windows would be blown out, glass shattered and very often the side of the building would be blown out."

The court overruled the defendant's objection to said question and answer and permitted the witness to answer the same in the hearing of the jury, to which action and ruling of the court the defendant duly excepted.

Speaking of the condition and sides of the building in the rear of the building the doors, windows and sides of the building were perfect when we entered it. We had to force our way into the doors and break the windows with bricks in order to get the water inside on the flames. We finally had to go on some adjoining roofs in order to get [fol. 100] water on the building, mostly because of the smoke which we couldn't stand. When we first got into the building we went toward the front of the building almost as far as the elevator shaft, before any of the floors fell from above. In trying to get the hose out into the alley at the rear the hose fell against the wall and among some old cans and made an awful noise. After getting the hose out into the alley I made an investigation, found some cans setting there with tops upside down. "They fell down where the hose pulled them over". There were two or three cans standing with tops on them. I kicked them and they sounded hollow. I then raised and shook them and there was nothing in the cans at all. I found no cans on the first floor other than these old cans with nothing in them. I stayed at the building until 3:00 o'clock the following afternoon and the rest of the company remained there. At that time the building was still smoking but the fire was about out. We went up the ladder to the third floor of the building before it caved in and remained there until morning. I only worked about the middle of the

building in the rear—"east side of the building next to the alley".

Cross-examination:

When I got to the rear of the Bachmann Building after the alarm the rear windows were closed and were not broken. Just a little bit of smoke was rolling out from them, probably because the casements were loose. I don't know what made the casements loose unless they were a little big and did not fit so tight. If there had been an explosion it would knock the glass out. There was not a thing wrong with the windows when we got there. We could shove them up and down. If there had been an expl-sion it would have twisted them. The windows may have been tight or they may have been loose. At any rate there was smoke coming out from the sides of the windows.

Thereupon counsel for the defendant attempted to interrogate this witness regarding certain alleged statements he had made in regard to the gasoline cans to Mr. Russell L. Furbee, one of counsel for the defendant Company, about a week after the Bachmann fire. It appeared that [fol. 101] the witness had then talked to Mr. Furbee about the fire while the latter was making an official investigation thereof in his capacity as Assistant District Attorney for the Northern District of West Virginia. The plaintiff objected to the examination of the witness as to any statements or disclosures made by him during such an official investigation, and the court sustained said objection, to which action and ruling of the court the defendant duly excepted.

ELMER FADDIS

Direct examination:

Is the same witness who has heretofore testified upon behalf of the defendant company. Along with Ashby Jackson, I reached the scene of the Bachmann fire eight or nine minutes after the alarm was given. I went in on the first floor as far as the elevator shaft, from the rear end of the building. I did not see any five gallon cans or cans of any kind. I never even looked around.

CHARLES MILLER

Direct examination:

Has been a member of the Wheeling Fire Department for eight years and worked on the Bachmann fire in 1925. I did not get there until about 6:00 o'clock the following morning and stayed there until away in the night of December 28, that is I was there all day Monday and until Monday evening. I was all over the building. I was on the first floor of the building, including the rear thereof, and I did not see any gasoline cans there.

I was all over the building, and helped digging around. I did not see any gasoline cans. The building on Monday morning seemed as though it fell in from the top—the top floors had all fallen in. Part of the roof had fallen in though there was a little bit still hanging. I was on the third floor most of the day and did not see any gasoline there.

[fol. 102] Cross-examination:

I went in the rear entrance of the Bachmann Building. That part of the building had been burned; it had burned all over. I didn't see any grain or sugar in that part of the building. As to condition at rear of building:

"A. It was kind of fell in,—of course, I was looking for fire. I was hunting where there was any fire to break out."

Examination by the Court:

I did not see any five gallon cans or any other cans on the first floor. In regard to what I saw on the third floor rear of the building, I was hunting for the places of the fire, mostly. I had a hose in my hand and was trying to put out the fire where I saw it. I saw a lot of stuff that fell in there. The third floor had fallen in pretty nearly all the way back to the rear wall, I would say within about four or five feet of it. There was a little shed where I was standing on the third floor—kind of a little roof over it. It had not fallen in there, but had fallen in all around. Where I was on the third floor, it seemed that there was only about four or five feet of flooring that had not fallen in but on the other side it seemed like the floor was up on the third floor. I worked on the third floor nearly all day and had only a space of four or five feet to

work on. It was dangerous. I did not see anything on the third floor except a lot of stuff.

STIPULATION

At this point it was stipulated upon the record that the mail carrier on the route that delivered mail to the Riley Law Building delivered mail there addressed to Charles F. Bachmann beginning November 27, 1925, and for the following six months.

Thereupon it was further stipulated upon the record that immediately prior to Thanksgiving day in November, 1925, the telephone service, the gas service and the electric light [fol. 103] service were cut off at 1312 Main Street, Wheeling, W. Va., at the request and by the direction of Charles F. Bachmann by the respective companies furnishing the same and that none of said services were renewed by Charles F. Bachmann or anyone else between that date and the time of the fire on December 27, 1925.

WILLIAM B. CASEY

Direct examination:

Is an attorney at law practicing at the Ohio County bar for twenty-four years with offices at No. 600 Riley Law Building. My office was in said building during November, 1925, and succeeding months. In November, 1925, Charles F. Bachmann and Carl G. Bachmann had offices with me there. After Carl G. Bachmann left for Washington in November, 1925, Charles F. Bachmann took charge of his office. Until Carl G. Bachmann returned, Charles F. Bachmann made his office in his son's office and was there practically every day. So far as I know Charles F. Bachmann transacted all of his business in that office and paid the rent to me.

LOUIS BROWN

Direct examination:

Has been a member of the City Fire Department of Wheeling a little over ten years and was present in that

capacity at the Bachmann fire in December, 1925. I got to the fire about 5:30 o'clock on Sunday evening and was in and out there until Monday morning. I was there practically all day Monday. I did not make any particular examination of the inside of the building, but went through it and looked around, pulling the hose in and out. I was on the first floor of the building and looked in the rear of the second floor. The roof had caved in and I couldn't get all the way through. I was also on what remained of the third floor of the building. The prohibition officers came to the building Monday afternoon, probably around 3:00 o'clock. I believe Mr. Prince, Mr. Smith and Mr. Heide were there. [fol. 104] I did not pay much attention to them as I was working and looking after the hose. I don't just recall whether the officers were on the third floor that day. Later I was at the Bachmann Building with these prohibition officers. I don't remember the day, but the Chief of the Fire Department told me to take a thirty-six foot ladder down there which I did. About 1:30 o'clock in the afternoon I put the ladder up against the building and then the prohibition officers went up there, Mr. Smith was the first one up and then I went up and then Mr. Doerr and another gentlemen. Mr. Prince was down in the alley. We throwed some stuff out of the first window from the Fourteenth Street side. Boilers, little pipes, and a whole lot of stuff. I only saw one boiler that day; I was in on the third floor of the building on the first day. I helped carry the boiler over to the window and we threw it out, with some burners. There were also several tanks that had little gauges on top of them. I carried one of those down and Mr. Smith carried the other down. After we got them all out in the alley, Mr. Prince suggested that we put them in the truck belonging to the Fire Department. We thereupon put the articles in the truck and took them to the County Jail and they were carried down to the basement part. I helped to carry the things. The boiler was all flattened out; it was bent and dinged. The roof had fallen on it. I did not see anything in the boiler. I did not see any gasoline on the third floor nor did I see any on the first floor.

JOSEPH P. SHAUGHNESSY

Direct examination:

Has been a member of the Wheeling City Fire Department for about ten years and attended the Bachmann fire. I heard alarm, went to hose house, changed clothes and arrived there about 6:15 Sunday evening and stayed there until 9:00 o'clock the next morning. When I got to the fire I tried to enter on the first floor but I couldn't get in. We had a ladder on an adjoining building and I went up this fifty foot ladder and we took a line up. Just as we got the line to the top, the roof fell in. It was a very hot fire, and [fol. 105] I can not say that I have ever in my experience seen a hotter fire than that at the time I got there. I was not able to get inside of the building until 2:00 or 3:00 o'clock on Monday morning. The two top floors of the building appeared to me to have caved in in the center and went through. Part of the rear end of the building and rear floors were standing.

I went in the front of the building the next morning about 7:30 but I was not in the rear of the first floor, was on the second floor a short time. I was on the third floor in the rear of the building and did not see any gasoline or gasoline cans. My attention was attracted to the fire and I never thought of gasoline or anything else. I did not see any gasoline cans on the third floor, and I was up on the fire wall, and after we had the fire under control there was a little fire in the corner and we took a small ladder and put it in the building. I went out of the building the way I went in.

Cross-examination:

It was a very cold day and the water froze very quicky as it was thrown upon the building by the firemen.

STEPHEN WALL

Direct examination:

Has been a member of Wheeling Fire Department for about eleven years. Arrived at the Bachman fire around 6:00 o'clock on Sunday evening. I couldn't get in the build-

ing as it was a roaring furnace—a hot fire. I stayed at the fire all night and until about 9:00 o'clock the following morning. I went into the front of the building on Monday morning about 8:00 o'clock. The building was then in bad condition as the roof was part down in the middle caved in from the middle came down in the middle of the floor. I was not on the second or third floors of the building and did not go back to the rear at all. I did not see any gasoline where I was.

[fol. 106] WILLIAM GUTMAN

Direct examination:

Is in the insurance business formerly in government service and resides at Wheeling, W. Va. In November and December, 1925, was soliciting insurance for Alexander R. Campbell and had been so engaged for some time. Is familiar with the Bachmann property on Main Street in Wheeling and was in 1925, and prior thereto. I was in the building probably two or three times every week before the fire.

"Q. Mr. Gutman, in conenction with your business with Alexander R. Campbell, the insurance man, tell the jury whether or not you had occasion to go down there for the purpose of making some change in an insurance policy occasioned by some change in the business that was going to be made there? Whether or not you were down there at that time?

A. Yes, sir, along early in 1925, I went down with Mr. Campbell.

Q. By Mr. Campbell you mean whom?

A. Mr. Alex R. Campbell, the man I worked for.

Q. The insurance man?

A. Yes, sir. I had some other business with Mr. Bachmann that morning. I told Mr. Campbell I was going down to see Mr. Bachmann, and he said "Wait, I am going down, I have to look over the premises on account of——"

Q. Tell the jury whether or not you accompaniel Mr. Campbell on that occasion?

A. I accompanied Mr. Campbell there and went there and met Mr. Bachmann.

Q. What did you see? What did Mr. Campbell see? What was being carried on there?

The Court: The witness can tell what he saw there.

Mr. Bachmann: State what you saw and what Mr. Campbell saw and where you saw the things that you are going to describe.

Mr. Furbee: He can not state what Mr. Campbell saw.

The Court: The witness can tell what he saw there.

Question withdrawn.

[fol. 107] Mr. Bachmann: What part of the Bachmann building did you go to on this occasion when you went there with Mr. Campbell?

A. Went to the office of Mr. Bachmann in the front of the building on the second floor, and met him.

Q. Who was with you when you went to this office with Mr. Campbell, and what occurred there?

A. Mr. Bachmann walked out with us, opened the door and went out and met a man by the name of Mr. Huff, who he said was running this oil business, I think it was—I think it was Eze, or some such name.

Q. Auto Eze?

A. Yes, Auto Eze. He called Mr. Campbell's attention to the various barrels of oils and different things, cans, and everything, and Mr. Campbell told him that he would have to safeguard himself,—he would have to go to work and have a can for the waste material—something in the way of a slop can, and also told him he would have to have receptacles under each of the barrels—the bungs of each barrel, to have something there to catch the oil—the drippings. There was a gas stove, and he would have to have a piece of zinc put under that stove. And from there we went to the third floor.

Q. Before you leave the second floor, you say Mr. Bachmann took Mr. Campbell out and showed him these barrels of oil and cans?

A. No; Mr. Huff did.

Q. Were you there at the same time?

A. Yes, sir.

Q. And Campbell was there besides you?

A. Yes, sir.

Q. I wish, if you can, you would tell the different kinds of oils that you saw there or that were mentioned or pointed out, as the kerosene, carbon oil, gasoline, grease.

A. They mentioned grease; they mentioned oil; they mentioned gasoline, and some kind of a lubricating oil. That is the only thing I can recollect.

Q. You went, I believe, from the second floor to the third floor. Who went from the second to the third?

A. Myself, Mr. Campbell and Mr. Huff.

Q. Do you know whether his name is Ira P. Huff?

A. No, sir, I couldn't tell you that.

Q. He is a man that was, at least, conducting the business and giving the directions?

A. Yes, sir.

Q. What did you see on the third floor?

A. I don't recollect what I saw.

[fol. 108] Mr. Guiher: I was waiting to make sure Mr. Handlan was through with this line of examination. This goes to the same extent that the Whitely evidence did some time ago. It involves the same proposition. I am going to make a motion, when he is through, to exclude this testimony. I will wait until Mr. Handlin is through.

Q. Mr. Gutman, Plaintiff's Exhibit No. 2 and Plaintiff's Exhibit No. 5, being insurance policies, one of the St. Paul Fire & Marine Insurance Company, and the other of the American Central Insurance Company, showing by their endorsements they were issued by Alex Campbell & Co., agents, each having attached to them what is called Form No. 4—a rider—that mentions the privilege given for "bottling automobile oils, offices and other mercantile business not more hazardous", and signed "Alex R. Campbell & Co." Do you know whose signature that is?

A. Yes, sir, that is Mr. Campbell's signature.

Q. I will ask you whether you know whether or not the visit of Campbell and yourself to the Bachmann property at the time you mentioned, had any connection with the putting on of these riders?

A. Yes, that is what he went down for. He was called. He told me he was going down to see Mr. Bachmann—that he called him up."

Thereupon, counsel for the defendant moved to exclude all of the quoted testimony of the witness Gutman afore-

said, relating to the visit of Mr. Campbell and himself to the Bachmann Building and the observations made there in connection with the materials kept on the premises and what was said and done in that respect, the motion to exclude going to each and every answer of the witness. The court reserved its ruling upon said motion for the time being.

I went down to the Bachmann Building on Main Street in the latter part of November or in December, 1925, and Charles F. Bachmann was not there. The building was locked and later I found he had moved to the Riley Law Building. Afterwards I saw Bachmann at his office in the Riley Law Building and visited there nearly every day. I met Charles F. Bachmann on Main Street on various occasions but I do not recall ever seeing him try to get into the Bachmann Building after he had moved his office to the [fol. 109] Riley Law Building. I was in the Bachmann Building the next day after the fire between 10:00 and 11:00 o'clock A. M. on Monday morning. I went in the front of the building for a few feet and afterwards went around to the rear. I was on the first floor of the building. I did not see any cans of gasoline and did not see anything. All I saw was the debris in the middle of the building and there was a mixture of everything. I couldn't tell what it was.

WILLIAM SCHELL

Direct examination:

Has been a member of the Wheeling Fire Department for about nine years. I reached the fire at the Bachmann Building between five and six o'clock on Sunday evening close to six o'clock. Only a minute or two after the gong sounded. I went to the front of the building and remained at the fire until about 10:00 o'clock the following morning. It was one of the hottest fires I have ever seen. The whole front of the building was on fire. We could not put our ladder up against the Bachmann Building and we put them up on the next building. Was at rear during fire—"all over it". I was on the first floor of the building about 5:00 o'clock on Monday morning but did not go in very far as the floors were falling. Asked if he saw any gasoline on first floor, witness said: "I did not see a bit of gasoline."

Cross-examination:

There was plenty of ice everywhere the night of the fire. I did not see any sugar in the rear of the first floor. I spent almost all the night in the adjoining building—that is the Zanetits Brothers Building. The next day we were around different parts of the Bachmann Building, but could not get into it very deep.

EDWARD F. DEIHL

Is a public accountant residing at Wheeling. Is City Councilman and formerly accountant with State Bank Examiner. I have been keeping Charles F. Bachmann's [fol. 110] private books for about nine years. At the time of the fire in the Bachmann Building, Charles F. Bachmann had his office at No. 600 Riley Law Building, and he had been there about a month. We vacated the building on Main Street, and I was in his office in the Riley Law Building on Thanksgiving morning, 1925, helping him to straighten out the office. He moved from the Main Street building on Thanksgiving day or the day before Thanksgiving, and on Thanksgiving morning I was in his new office in the Riley Law Building helping him to straighten up. From then on I was in his office in the Riley Law Building about two or three times a week. After the office was moved, it was necessary for us to go to the safe left in the Main Street building to get certain papers, as only the live books and papers had been moved to the new office. Bachmann had left two safes in his old office in the Main Street building. It became necessary for us during December, 1925, to go to the old office on two or three occasions in order to get papers. Mr. Bachmann and I went down on several occasions to the Main Street Building, but could not get in, as the building was locked. This was during business hours, around two o'clock in the afternoon. Also, one evening Mr. Bachmann and I went to the Main Street building and I tried the door, but could not get in.

I was in the Bachmann Building the morning after the fire between 10:30 and eleven o'clock. I looked in at the front and also looked in at the back, but could not get in the building. The building was still smoldering and water was being played upon the fire. I could see from rear of

building into the center of where the débris had fallen down into the alley. There were no twenty-five five-gallon cans of gasoline on the first floor. I did not go into the front of the building, because it was all covered with ice.

Cross-examination:

I did not see any cans of gasoline at the rear of the first floor of the Bachmann Building.

Redirect examination:

If there had been 25 five-gallon cans of gasoline in the [fol. 111] rear of the first floor of the building, I would have seen them.

Recross-examination:

I went up the alley in the rear of the Bachmann Building, and looked in either a window or a door, "there was an opening" and saw the heap of débris in the center, and upon that examination I did not see any cans of gasoline. I could not get inside the building and only went as far as the door. I could not get in on account of the smoldering fire, and water being played on it.

W. Barclay Johnson

Have lived in Wheeling, W. Va., for about thirty years. Is engaged in oil and gas business. Is acquainted with Charles F. Bachmann. In the last few days of November, 1925, and the month of December, 1925, Bachmann had his office in the Riley Law Building; he knows this because he was there nearly every day—we had business relations together. I was frequently in the Main Street property while Mr. Bachmann occupied it, probably three or four times a week for several years. We had business interests together. Bachmann left the Main Street building and moved to the Riley Law Building a day or so before Thanksgiving, 1925. I was in his office the last day he moved out of the Main Street Building, the day he took the last of his papers out. In December, 1925, between Thanksgiving and Christmas, Bachmann and I went down to the Main Street Building in order to get some blueprints of a

mine and a geology book which he had left in the steel cabinet in his office there. I wanted these blueprints and the book after he had moved out of the Main Street Building. We went down to the building one day to see if the people he had leased it to were in it. This was between Thanksgiving and Christmas. The building was locked and we couldn't get in. Also, one night Bachmann and I walked down Main Street together in the evening and in passing the Bachmann Building he stopped and shook the door just as he passed.

I was at the building the next day after the fire but was not inside. I looked in the doorway in front and then went [fol. 112] around and looked in the window at the rear of the first floor. I couldn't see very far into the rear of the building; there is a sort of room there—a partition which separated it—as I remember. When I looked in about 9:00 or 10:00 o'clock the morning after the fire I would say positively there was not any twenty or twenty-five five-gallon cans on the first floor. I think I would have seen them and I have no recollection of seeing it at all.

Cross-examination:

I looked in the window from the rear. I did not see any sugar; my recollection is that the room was empty. I looked from the window into the room, the window being broken in. I could see the entire room.

FRANK SCHIRRIPA

Direct examination:

Conducted wholesale grocery business next door to the Bachmann Building in 1925, at No. 1314 Main Street. I had been in business there two or three years before the Bachmann fire. After November, 1925, when Mr. Bachmann went to the Riley Law Building, plenty of people came down to the Main Street Building looking for Mr. Bachmann. They would go to the building but the place was closed, and they would come to me to inquire. I always directed them up to the Riley Law Building. I never saw Charles F. Bachmann inside of the Main Street building

after he left it in November, 1925, although I have seen him at the front door.

I saw the Bachmann fire and was in the building the following day. I walked in the rear of the building on the first floor a distance of about twenty or twenty-five feet and was there several times. I was curious to see what damage had been done. I did not see any gasoline cans. I didn't see anything like that. There were none there, I did not see any.

On the night of the Bachmann fire, I was rooming in the home of Mr. and Mrs. Forsch, on 14th Street. My room was on the side of Forsch's house closest to the Bachmann Building and I was in the room when the fire broke out. I [fol. 113] did not hear any explosion on the night of the fire. I just heard the fire engines and the whistles and the people running. I did not notice the Forsch Building jar or shake from any explosion.

Cross-examination:

There is a door at the rear of the first floor and then one went down about three or four steps—it is a little high. There was a partition there—kind of a back office, but when I went in the partition was destroyed. A lot of the débris had fallen there.

DAVID A. MCKEE

Direct examination:

I am an attorney practicing at the Ohio County Bar since 1906, and a former prosecuting attorney of the county. In the early part of December, 1925, I went to see Carl G. Bachmann at his office in the Riley Law Building, and found Charles F. Bachmann was there, Carl Bachmann having gone to Washington to attend Congress. I talked with Charles F. Bachmann on that occasion for a considerable time, visited him there frequently thereafter, probably two or three times that month. Charles F. Bachmann was occupying the office in the Riley Law Building at that time.

H. L. KIRK

Lives in Wheeling and was at one time mayor of the city and served two terms. Also served one time as City Man-

ager, from July 1, 1925, to July 1, 1927. Was formerly engaged in the wholesale grocery business and is President of the Wheeling Savings & Loan Association.

I arrived at the Bachmann fire a few minutes after it broke out. I was interested in the fire because of my official position and I stayed there until 1:00 or 2:00 o'clock in the morning. I then returned to the Bachmann Building on Monday morning around 8:00 and I visited the property at least half a dozen different times that day. The city had [fol. 114] 12,000 feet of fire hose in and about the building. It was a cold, bitter night and the hose lying on the ground froze stiff. I was interested in getting the hose to a warm place. I was in the building and on the first floor in the rear of the building. I went into the rear on the first floor about sixty-five feet to the place where the center of the building and floors had dropped down so as to make it impossible to get through. I was interested in ascertaining cause of fire and anxious about safety of the building.

I was in the building several times. I did not make any real thorough examination but I saw practically everything to be seen. I did not notice any gasoline cans on the first floor of the building in the rear and think I would have seen them if they had been there. I don't think there was any gasoline on the first floor, I didn't see any; if there had been any there, I think I would have seen it. I didn't see any gasoline cans.

Was in the wholesale grocery business for seventeen years until 1912, in the City of Wheeling.

Thereupon, the witness was asked by counsel for the plaintiff whether it was customary for a wholesale grocery to handle, among other things, gasoline, kerosene and oils, to which question counsel for the defendant objected. The Court sustained the objection upon the ground that the Bachmann Building on Main Street was not, according to the testimony, being used as a wholesale grocery store at the time of the fire, and that evidence of custom and usage was not proper. To this ruling of the Court the plaintiff duly excepted, and in order to complete the record the witness made the following answers out of the hearing of the jury:

"A. Well, in the days that I was in the wholesale grocery business, of course, there was very little gasoline, but

the wholesale groceries at those times did handle combustible materials—lots of it,—like powders and some oils. That is, they had various oils and things of that kind. In recent years, since they have done away with horses and are using trucks, the wholesale grocer while he does not sell gasoline, yet he has gasoline and oils and materials of that kind around his business. But a wholesale grocer does sell a lot of combustible materials like miners' supplies,—[fol. 115] powders, and things of that kind. Years ago when I was in the wholesale grocery business, a wholesale grocer sold most all the lamp oil. But lamp oil is gone, and there are other oils being sold by the wholesale grocer in place of the lamp oil.

Mr. Carl G. Bachmann: I want to preface that if the witness were permitted to answer, he would answer as he has answered.

Q. Under what circumstances did the wholesale grocers keep gasoline?

A. For the supply of their own trucks.

Q. Do they keep it in their building?

A. In the basement, as a general thing, or first floor—or rear of the first floor, usually. They carry not so much in the basement as on the first floor—usually in the rear of the first floor.

Q. What kind of containers do they keep it in?

A. Mostly cans, barrels."

Thereupon, the examination of the witness was resumed in the presence of the jury.

I had been in the vicinity of the Bachmann Building, at the corner of Twelfth and Main Streets, for several hours preceding the fire. I did not hear any explosion of any kind prior to the fire. About midnight after the fire had started I heard several explosions in the adjoining building of Zarnits Brothers Grocery, but not in the Bachmann Building; there must have been eight or ten.

Cross-examination:

I did not see any cans of gasoline in the rear of the first floor of the Bachmann Building. I did not see any cans at all there. Nor did I see any sacks of sugar.

E. W. EXLEY

Direct examination:

Is manager of the Palace Furniture Company which at the time of the fire occupied the second building north [fol. 116] of the Bachmann Building. I was at the scene of the fire all night and the following day. I went into the Bachmann Building the day after the fire because I wanted to see what had been the cause of the fire if possible. I went in the back door on the first floor and went in as far as I could go. I could only get about one-third of length of building, which is about 120 feet long because the floors above had fallen through. I did not see any gasoline there nor do I remember of any gasoline cans. The only thing that I saw there was rubbish from the fire.

All that I recall seeing in the building was the rubbish and things like that that had fallen down from the other floors.

WILLIAM JASPER

Direct examination:

I am engaged in the structural and ornamental iron business and am related to the plaintiff in this case by marriage. Charles F. Bachmann left the office in the Bachmann Building on Main Street in November, 1925, around Thanksgiving and moved to the Riley Law Building for about four or five months. I was in his office in the Riley Law Building and I went on several occasions to the Main Street Building and could not get in. I passed the Main Street Building with Mr. Bachmann a couple of times and he was expecting that a tenant to whom he had rented the building would be in there, and he was wondering why the tenant hadn't taken possession of the property with his goods. I never saw Bachmann try to get into the building because he said he had no keys. I saw him try door over a period of two years. He was particular about his property no matter who had it. During the month of December, 1925, while I was with Buchanan I saw him try the Main Street door on an average of once a week to see whether it was open. The door was never open so he could get in.

The front door had either a Corbin or Yale lock—a rim-latch night lock.

The witness was then handed the same lock which had theretofore been shown to the witness David Tyler, and [fol. 117] the reporter, at the suggestion of the Court, identified the lock as Plaintiff's Exhibit No. 10—Lock. The witness stated that this was the type of night lock to which he had reference.

There was no other key operated lock on the Main Street door. There was a regular hand thumb lock used on all doors of that type just to gain access when the night latch was set. It was not necessary to have a key to open that type of lock, nor is it necessary to have a key to lock it after the door is open. When you are ready to leave, the latch is set and it will lock itself by the action of pulling the door shut. I was in building on night of fire.

I was in the Bachmann Building the day following the fire, about 1:00 o'clock in the afternoon. I went into the building on the first floor in the rear a distance of thirty or thirty-five feet. The upper floor had fallen in and it was hardly possible to get around in there. I was there on first floor in rear for about a half hour. I did not see any gasoline or any gasoline cans.

GEORGE H. MILLER

Direct examination:

Is engaged in the moving and storage business. I had a furniture business three doors south of the Bachmann Building and also conducted my express business therefrom. In November, 1925, I moved Charles F. Bachmann's office effects from the Main Street Building to the Riley Law Building. I never saw Bachmann thereafter in the Main Street Building.

The day following the fire I went into the rear on the first floor of the Bachmann Building about half past 9:00 o'clock in the morning, to a distance of twenty-eight or thirty feet. Because of conditions there I could not get any further. I did not see any gasoline cans or any gasoline

there and I was in a position to see them if they had been there.

[fol. 118] EDWARD BACHMANN

Direct examination:

Has lived in Wheeling entire life, fifty-one years. Is a brother of Charles F. Bachmann and brother-in-law of the plaintiff in this case. After the fire I was in charge of the crew which dismantled the Bachmann Building on Main Street. I took off the lock which was on the front door of the building. The lock which has heretofore been identified herein as Plaintiff's Exhibit No. 10—Lock, was the one which I took off about two or three months after the fire. John Brewster was with me at the time. This lock has been in my possession ever since. The front door was painted green half way up and there is still some green on the lock. It is an old lock and must have been on there for years; I have seen the lock hundreds of times on the door. This lock fits on the lower door. The upper door is bolted top and bottom and *and* you would have to put your key in to unlock it in order to get in the building. If you were inside and wanted to come out and lock the door, you would take your key and unlock the door and stick it in your pocket. The minute you snapped the door shut it locks itself. If you wanted to leave the door unlocked you set the latch. You could simply slam the door and it would lock itself. This lock was on the front door of the Bachmann Building on the night of the fire and had been there continuously for years before.

At this point the lock identified as Plaintiff's Exhibit No. 10—Lock, was introduced in evidence and so identified. It is stipulated and agreed that counsel for either party may exhibit this original lock in the Appellate Court, if desired.

I got to the fire about half an hour after the alarm and it was pretty hot. I stayed there until about midnight and returned the following morning around 7:00 or 8:00 o'clock. The fire had gutted the building. The fourth floor, or loft, was partly burned down and some rubbish and furniture

was all hanging down. I would estimate that about forty- [fol. 119] five feet of the fourth floor remained in its original form. This fourth floor extended back from the front about one-third of the depth of the building. After the fire the third floor was standing to a point about twenty-five feet from the rear and then it was practically all down, up beyond the elevator, except for twelve or fifteen feet at the front of the building. There were two safes there. I immediately after the fire took precautions to prevent these large safes from falling down but this was not on Monday. On Monday I went all through the building, including the first and second floors; the water was running—I could not climb up. I put up a forty foot ladder in order to get on the 4th floor. There was no gasoline or gasoline cans on the first floor. I crawled through the first floor and could see everything there. There were some barrels, about forty-two, on the third floor; you couldn't get any barrels on the fourth floor. I drained the barrels, which contained water.

"Q. To what extent was the water frozen—how much of it was frozen?

A. Some of the barrels,—the expansion of the ice bursted the hoops. They formed a scum around the ice, possibly an inch thick, to hold the water. In order to get on there I chopped away in the ice with my ladder and leaned my ladder against it, and bored into the first three or four barrels, as far as I could reach from my ladder, and let the water drain, because I was afraid. An additional ten pounds would cave the whole thing down and I might kill myself.

There was no mash of any kind in the barrels, it was all water. I actually counted forty-two barrels. I afterwards broke these barrels up when I cleaned the building out to get the quantity in the truck. I did not see the stills or whatever they were on the third floor, they had dumped them out into the alley. They were dumping them out when I got there."

I couldn't get up to the place because the firemen were working there.

They were dumping the stills out of the building by just pitching them out of the windows. I did not see any gasoline or cans of any kind on the third floor of the building.

About Thanksgiving, 1925, Charles F. Bachmann left the [fol. 120] Main Street Building and moved up to his son's office. I am able to fix it at Thanksgiving as we had a lot of business that I look after. I look after all the property back and forth all the time. Carl Bachmann, the son, left on Thanksgiving Day and Charles F. Bachmann occupied his office until Carl came back from Washington in June or July, 1926. Carl's office was in the Riley Law Building. I was with Charles F. Bachmann frequently after he moved out on Thanksgiving Day when he tried to get in the Main Street Building, both by night and day and probably three or four times a week.

I was frequently in the Bachmann Building on Main Street when the business was being carried on there by Huff and others. Various oils, gasoline and stains were used in the Auto-Eze business conducted there.

(Counsel for the defendant objected to and moved to strike out the testimony of this witness regarding the materials used in connection with the former business carried on in the building. The court reserved its ruling.)

The fire at the Bachmann Building was very hot. For years prior to this fire, the building had been used for a grocery, produce and commission business. The principal business for the last fifteen or sixteen years had been the wholesale produce business. There was considerable dirt which would accumulate from potato sacks, etc., but there was nothing inflammable there.

JOHN BREWSTER

Direct examination:

I assisted Edward Bachmann in dismantling the Bachmann Building on Main Street and in removing the debris therefrom. There was a night latch on the front door of the building. The lock introduced in evidence here as Plaintiff's Exhibit No. 10—Lock, is the same one which was on the front door of the building, because I helped to take it off. I recognize it because of the green paint on it which was the same as the door.

[fol. 121] EDWARD T. ROSE

Direct examination:

Was a member of the Wheeling Fire Department for sixteen years and served as chief of the department for eight years. During my sixteen years of experience I have attended many fires of considerable magnitude. I reached the Bachmann fire about a half hour after it started between six and seven and remained there about three hours. It was a very serious fire, looked to be about the south wall and was awful hot, blazing through the roof, it was a pretty hot fire. In the course of my sixteen years' experience, I have seen thirty or forty gasoline fires—that is where there was explosions of gasoline in the burning building. Whenever we knew there was gasoline about a fire we would be very careful. If the fire got close to the gasoline it would always burn up.

Thereupon, the following proceedings were had within the hearing of the jury:

"Mr. Handlan:

Q. In order to present the matter concretely, Chief, I will now ask this question: You having had the experience you have had, with the Wheeling Fire Department, being present at the December 27, 1925, fire, at the property on 1312 Main Street, having stayed there for about three hours and noted the intensity of the fire as it had progressed up to that time, what in your opinion would have happened to the cans of gasoline, or how would the fire *would* have affected the cans of gasoline, if there had been a five-gallon can of gasoline on the third floor located about twenty, twenty-five or thirty feet west of the east wall, and there had been twenty-five five-gallon cans of gasoline on the first floor located about twenty-five or thirty feet, approximately west of the east wall, the cans being tin cans, square in [illegible] five gallons in quantity, and capped with screw tops, [illegible]t would have happened to that gasoline in that fire as you saw it?

Objected to.

[fol. 122] The Court: Now, state the grounds of objection.

Mr. Guiher: We think it is an improper question. We

do not care to argue. It is so speculative, we think, that we think it is highly improper.

The Court: The chief may answer that question, giving his best judgment, which is the result of sixteen years as a fireman, eight years as chief of the Wheeling Fire Department, and having been on the scene and observed the fire, and the conditions surrounding the same,—he may give his opinion as to what would have happened, for what it is worth.

Defendants, by counsel, excepted to the ruling of the Court.

A. My opinion would be that the gasoline would have exploded. It could not have stood that heat.

Mr. Handlan: Now, Chief, if there was on the third floor of the building and near to where the five-gallon can was alleged to be, as I have described, its position in my question, and there were two gasoline compressors each being filled about half full of gasoline, and each of some twenty to twenty-five gallons capacity, and there were on the third floor,—about twenty-five to thirty feet west of the east wall, what, in your opinion, would have happened to those gasoline compressors if they had that much gasoline in them?

Objection. Overruled. Exception by defendant.

A. I think they would have exploded, too."

The defendant duly objected to the foregoing questions, and each of them, but the Court permitted the said witness to answer the same in the hearing of the jury, to which action and ruling of the Court the defendant duly excepted.

Cross-examination:

Gasoline will burn when it is open and it will explode when it is closed. I do not know at what temperature gasoline would explode. This was a very intense fire. If gaso- [fol. 123] line should spread over the floor, and form a gas, it would explode if you touched a match to it. Gasoline will explode if it is confined. If you take gasoline and spread it out on the floor and touch a match to it there would be a puff. If gasoline is placed in an open bucket

or receptacle and a match lighted to it, there would be a puff when the gasoline first lights and then it would burn.

It was a very cold day and the water poured upon the building froze. It was pretty close to zero that night. I do not know at what temperature gasoline freezes. I never knew of any alcohol freezing. I do not know what mixture of gasoline vapor, or what mixture of gasoline and air is necessary in order to have an explosion.

At this point counsel for the defendant renewed their motion to exclude and strike out the testimony of the witness Edward T. Rose, objected to as hereinabove noted, but the Court overruled the motion and the defendant duly excepted.

DR. R. J. HERSEY

Direct examination:

Has been a physician in Wheeling for twenty-five years, and has known Charles F. Bachmann about that long. Prior to November, 1925, I was in the Bachmann Building on Main Street almost daily for a couple of years, because I was associated with Bachmann in different lines of business, and during the last year before the fire I had a desk in Bachmann's office. Bachmann left the Main Street building on Thanksgiving day, 1925, and thereafter had his office in the Riley Law Building until his son returned from Congress, a period of approximately six or seven months. I was in his office in the Riley Law Building almost daily.

I remember seeing Mr. W. S. Smith of the Auto Sales Company in Bachmann's office on Main Street prior to the time Bachmann left there. I remember that they were fixing the elevator the day Smith came in, and he had to walk up to the third floor. This was sometime early in November, 1925. I overheard the discussion between Smith and Bachmann, but did not know the details of it. [fol. 124] I heard Smith say that he was up there in regard to his lease. I do not recall seeing Mr. W. S. Smith at Bachmann's office in the Riley Law Building after he moved up there. After Bachmann moved to the Riley Law Build-

ing all of his business was conducted there; he did not go back to Main Street building to conduct his business.

After Bachmann left the Main Street Building I was looking for some papers that were important to me and as he could not find them in the Riley Law Building, I suggested that they might have been left in one of the safes in the Main Street Building. Bachmann had no key, and he said I will go down with you and see if we can get in, and so we went down there I would judge about eight or nine times, as we frequently went by about the lunch hour, on way to brokerage office, and we would try the door and look in the window, but were never able to get the papers until the safe was recovered after the fire. During the period from Thanksgiving time to the time of the fire, Bachmann was not able to get into the building when I was with him.

I went down to the Bachmann Building about ten o'clock the morning after the fire. I was interested to see the condition of the safe that my papers were in. I did not go into the building that day, but looked in the best I could. I went to the rear of the building and looked through the window at the rear of the first floor, and what was left of the door there. I could see right up to the mass of débris which had fallen down from the upper floors into the center of the building, and you could see through to the upper floors in front. When I looked through the rear of the building I did not see any gasoline or gasoline cans.

Prior to November, 1925, I recall a man named Varisca coming to the Main Street building. He wanted to rent the building from Bachmann. I saw him in the office once and coming out of the building as I was going out a couple of times. This was just before we left the Main Street building at Thanksgiving time. I never heard anything definitely going on between this Bill Varisca and Bachmann except that Bachmann was negotiating with him for the renting of the building. Bachmann said he would not do it until he had surety for his rent and that he wanted to [fol. 125] have three months payment in advance to apply on the end of the lease. The time he was in the office that I recall there appeared to be a question in Bachmann's mind as to the surety of the rent for the building. Mr. Harry Meyers, General Manager of the Carey Roofing Company, of Wheeling, on several occasions was negotiat-

ing with Bachmann for the renting of the building, and they had their engineers or architects come from the principal office in Cincinnati to measure up the building and see if it could be utilized and remodeled to suit them. I do not know what rent Bachmann asked Carey Roofing Company.

RALPH W. SNYDER

Direct examination:

In the contracting business in Wheeling. I went to the Bachmann Building the morning after the fire about eight o'clock, because I knew of the fire and I was looking for the job of replacing the damage that had been done. Also, I made a trip to Charley Bachmann's office which at that time was in the Riley Law Building. When I got to the building that morning everything was covered with ice. I went around to the alley in the rear and looked through the windows towards the front of the building to ascertain how much damage had been done. The first impression that I got in viewing the building was that it would be necessary to replace at least the second and third floor; they were all caved in towards the center of the building; the only remaining parts were towards the front of the building and a small portion towards the rear. By all appearances the building must have been empty at the time of the fire, because on the first floor all that was there was débris from the timber that had fallen from above. I did not see any gasoline on the first floor nor any gasoline cans, nor any five-gallon cans of any description. I did not see anything there with the exception of the floors that had caved in.

Cross-examination:

I did not see any bags of sugar or bags of rye and grain. I did not see anything except débris.

[fol. 126] M. C. KINDELBERGER

Direct examination:

Was for twelve years Captain and Assistant Chief of the Wheeling Fire Department, and was connected for thirteen years with the State Fire Marshal's office. I got to

the Bachmann Building about five or ten minutes after the alarm was sounded, and stayed there probably an hour or more. I made frequent trips back and forth up until probably eleven o'clock, but did not stay very long on account of the weather. It was a very intense fire. In the course of my experience with the Wheeling Fire Department and the State Fire Marshal's department, explosion of gasoline in fires have come under my observation a number of times.

Thereupon the following question was propounded to the witness by counsel for the plaintiff and answer returned thereto over objection of the defendant:

"Q. Now, Mr. Kindelberger, if there had been in this building on the third floor a five-gallon can of gasoline, located about twenty to twenty-five feet west of the east wall, and two gasoline compressors, each containing a capacity of twenty to twenty-five gallons of gasoline, and each about half full of gasoline, on the third floor, located near this five-gallon can, and about twenty-five to thirty feet west of the east wall; and twenty-five five-gallon cans of gasoline down on the first floor, located between twenty and thirty feet, approximately, west of the east wall, the gasoline cans that I have described on the first floor being square tin cans,—ordinary gasoline cans, with screw caps for their tops, what, in your opinion would have happened to that gasoline if it had been there, as a result of that fire?

Objected to.

The Court: The witness may answer, from his experience as an expert, as to what in his opinion——

Mr. Handlan: Answering the question, in your judgment and experience in the fire department.

[fol. 127] Objection. Overruled. Exception by defendant.

A. My opinion is that it would have exploded."

Counsel for the defendant objected to the foregoing question, but the court overruled said objection and permitted the witness to answer the same in the hearing of the jury, to which ruling of the court the defendant duly excepted.

ASHBY JACKSON

Direct examination:

Is the same Ashby Jackson who testified before in this case. There were several streams of water, at least six

or seven, playing upon the fire at the Bachmann Building in the rear during the height of the blaze, and a couple on the roof. Most of the streams we tried to get direct to where the fire was at. Some of them were working from the top down through and two in the alley playing on the windows in the second and third floors. Most of the fire seemed to be near the center of the building as near as I could judge from the back. There were at least three companies working over on Main Street and probably more. Most of the streams of water were active until around seven or eight o'clock on the following morning, and some of the streams were kept there for a couple of days. All of the fire companies were there from about six o'clock in the evening on Sunday until midnight or after. It was near five when we got the alarm.

It was awfully hot back in the alley where I was working. It was very cold and the water would come down and form ice. It had broken through on the side of the window, and the heat and smoke were so strong we couldn't stand it. The heat set some of the buildings on fire across the alley, which is twelve to twenty feet wide. The building on which we were on the roof stood back a little bit—ten or twelve feet. The buildings across the alley which caught fire were somewhere around twenty-five or thirty feet away from the Bachmann building.

I have been on the Wheeling Fire Department for 34 [fol. 128] years, and practically all that time in the Chemical Company. Our Company is centrally located and we attend more alarms than any other company in the City. I have attended a good many fires during that time in which there were gasoline explosions or gasoline in the building that burned up.

Thereupon the following proceedings were had during the direct examination of this witness by counsel for the plaintiff:

"Q. If there was a five-gallon can of gasoline on this third floor of this building during all the time that the fire was in progress, and there were two gasoline compressors also on the third floor, twenty or twenty-five gallon capacity, and each approximately about half full of gasoline, and these compressors and this five-gallon can

would be located on that third floor from approximately twenty to thirty feet from the east wall, west from the east wall towards the river, on that third floor, and with reference to one another were located from five to eight feet apart, and there was also twenty-five five-gallon cans of gasoline on the first floor, which was there during the entire progress of the fire, from your experience as a fireman,—and assuming taht these twenty-five five-gallon cans were to the rear rather than to the front—and they were possibly twenty-five to thirty feet west of the east wall on that first floor, from your experience as a fireman——

The Court: Mr. Handlan, I believe you have not stated whether or not those cans were closed?

Mr. Handlan (continuing): —and that the cans of gasoline on the first floor and the can of gasoline on the third floor were closed or secured with a screw top, and that the compressors were topped and practically tight, what in your opinion would have happened to that gasoline in those compressors and in those various cans I have described, as the result of that fire, as you saw that fire that night?

Objected to.

[fol. 129] The Court: State your grounds of objection.

Mr. Guiher: This is the same objection we have had before.

The Court: Mr. Jackson, for thirty-four years a fireman, located in the central part of Wheeling, having attended more fires, possibly, than any other company in Wheeling, will be permitted to give his opinion as an expert.

Mr. Handlan: What, in your opinion, would have happened to that gasoline?

The Witness: That gasoline, Mr. Handlan, would not stand that heat.

Q. How is that?

A. That gasoline you speak of would not stand that heat.

Q. What would have occurred?

A. It would explode. That would mean we would know it, because it is loud. You can see the flames, and there is

no use putting water on gasoline. It simply helps it. It don't put it out.

Mr. Guiher: We move to strike out his several answers purporting to give an expert opinion on this subject, and each of them.

Motion to strike overruled. Exception by defendant."

The defendant objected to each of the foregoing questions and answers, and moved to strike out the same, all of which objections were overruled by the court, and the defendant duly excepted as to each question and answer.

IRA P. HUFF

Direct examination:

Lives at Kenmore, New York. In 1925 I was located at Wheeling, West Virginia, in the business of manufacturing automobile chemicals. At one time my business was carried on in the Bachmann Building on Main Street. Bachmann told me I could go into his building. I was present at the building when the representatives of the [fol. 130] different insurance companies came down and inspected the business for the purpose of adding the rider to the policy. These representatives were men by the names of Marker, Gutman, and Alexander R. Campbell, the insurance man. This was the same Will Gutman who has testified in this case. At that time we had a rock along the left side of the building as you went in on which were drums of oil. We had a hot plate at the end of the building. These oils consisted of kerosene, what we call neutral oil, some vegetable oil, some gasoline, and a barrel of cup grease. Campbell came up and put his hand under the spout to see whether there was any drip of the spigots of the barrels. Mr. Marker was there also. I was asked by both gentlemen as to the nature of the ingredients. They were plainly told as to the nature of the materials and the ingredients that went into the formulas of the articles we manufactured, with reference to their inflamability. Based upon this information, we were instructed to put dripping pans under each spigot on the drums,

and we did so. We also were instructed to put a steel plate under the hot plate, and to provide a steel drum as a place to put refuse from the plant, such as paper and sweepings from the floor, and we did all this. I was in the Bachmann Building conducting this business from about June 1, 1925, until November 1, 1925. One day Charles F. Bachmann and I were sitting in the office in this building when a gentleman came in. I left the office and saw Bachmann taking him through the building. I later learned that this was the man who got the lease. I saw him in the building four or five times. The first time was in the early part of September, and then again about the middle of September, and then again in the later part of September. I was present when they were talking about the building and this man was trying to rent it. Bachmann was asking Three Hundred Fifty Dollars a month as rent, and the man was always ready to pay that amount of money.

After this man had been there around the first of September inquiring about the building, Mr. Meyers from the Carey Roofing Company, came in and asked if the building was for rent. Bachmann informed him that it was and that he was asking Three Hundred Fifty Dollars per month. Meyers said that they were having to vacate the building [fol. 131] where they were and that "this offers us the best location". Bachmann then took Meyers through the building. Meyers asked about a number of little changes, and when he came back to the office said that he would have to take the matter up with the agent at Cincinnati, Ohio. I heard Bachmann talk about this matter over the telephone on a number of occasions. Meyers came back again with the rental agent and a carpenter about fifteen days after the first trip and they went through the building very carefully and asked if certain changes as to the entry or steel beam across the front could be made. Bachmann assured them that the changes which they suggested would be made and Bachmann informed them that the rental would be Three Hundred Fifty Dollars a month. Bachmann agreed to give them a lease for five years.

The man who first came in as I have testified finally got the lease. It was signed prior to November 1, 1925, but I can't give the exact date. It was actually delivered on the last day of November, 1925, at the Riley Law Building,

Bachmann, the man who leased the building and myself being present. At the same time the keys to the Main Street Building were delivered to the new tenant. I gave him the key that I had and Bachmann gave him his key. I came in just after the transaction was closed. Bachmann told me in front of the tenant that the latter had paid him Three Hundred Fifty Dollars for the month of December, and had put up the additional amount of Ten Hundred Fifty Dollars as security for three months rent. Also, I recall that this foreigner paid a month's rent to Bachmann to cover the month of November, 1925, even before the lease was signed. This payment having been made in the Main Street Building.

Bachmann occupied the building on Main Street until about Thanksgiving time, 1925, and he then moved to the office of his son in the Riley Law Building, where I visited him thereafter every day and sometimes twice or three times daily. I was with Bachmann on several occasions when he attempted to get in the Main Street Building after that and he could never get in. Also, I myself looked in many times after that and could not see a thing; the building was clear of everything so far as could be seen. I tried to get in the front door myself in order to get two drums [fol. 132] belonging to the Freedom Oil Company for which I was being charged while they were out and which I had left there when I moved out just before November 1, 1925. I was never able to get the drums.

During the five or six months that I carried on my business in the Bachmann Building, I usually used the front door on Main Stre-t. This door had a rim lock and I can identify the lock as being the one which has been introduced in evidence in this case as Plaintiff's Exhibit No. 10—Lock. When I came out this door and intended to lock it it was not necessary to insert a key or turn it; I just pulled the door to and the lock would snap.

I went to the Bachmann Building the next morning after the fire between 8:00 and 10:00 o'clock, and went into it from the rear on the first floor as far as I could go, which was about thirty-five or forty feet. I would not be definite about that. There were positively no gasoline cans or gasoline on that floor. The ceiling of the first floor of the building was of metal and it had become so hot from the fire that it had charred the timber that held the first floor

until the nails pulled out and it sagged down. The metal plates had sagged in numerous places and the solder was melted off. This condition existed in the ceiling on the first floor and practically back to the rear door. I saw nothing with respect to the condition of the floors of the building, resulting from businesses that might have previously been carried on there which would render them *in*flammable or combustible.

Thereupon, counsel for the plaintiff asked the witness the following questions:

"Q. I do not mean in the nature of cans or stuff or articles sitting about on the floor. But I mean what condition the floors themselves were in before the fire as to oil being on the floor or gummy substances or candy from the produce business or anything of that kind if you noticed?"

To which question the defendant objected, and the Court sustained the objection, to which action and ruling of the Court the plaintiff duly excepted.

[fol. 133] Cross-examination:

I had a fire myself in Wheeling in a building owned by Charles F. Bachmann and I now have at least two or three suits pending against insurance companies by reason thereof. Mr. J. B. Handlan, one of counsel for the plaintiff in this case, is counsel for me in my cases. James M. Guiher, of counsel for the defendant in this case, is of counsel for the insurance companies which I have sued.

Thereupon, the following proceedings were had during the cross examination of this witness by counsel for the defendant:

"Mr. Guiher:

Q. Mr. Huff, I will ask you if on or about the 6th day of July, 1928, I did not examine you under oath in connection with the fire which you had on the Island, during the course of which I interrogated you regarding the materials and apparatus that you used in this process of bottling automobile oils?

Objection. Sustained. Exception by defendant.

The jury was here excluded from the court room, and the following proceedings were had in the absence of the jury:
The last question was read.

The Witness: Yes, you did.
Mr. Handlan: We move to exclude the answer.
The Court: Suppose you let it go through until we get through. This is without the hearing of the jury.
Mr. Handlan: I did not want the Court to think we were waiving anything.

Mr. Guiher: Mr. Huff, during the course of that examination, did I not ask you if in your process of bottling automobile oils, you used any gasoline?
A. Yes, sir.
Q. Did you not say no?
A. Because the conditions were different.
[fol. 134] Q. You admit that you told me at that time no you did 't don't you?

Mr. Handlan: Where do you mean used gasoline—at the Bachmann building or on the Island?
Mr. Guiher: I asked him about his process. I did not understand his process to be changed. He can make any explanation he wants to.
The Witness: Yes."

The plaintiff having objected to each of the foregoing questions and answers, and the Court having sustained the same, the said questions and answers were each taken out of the hearing of the jury and the defendant duly excepted to the action and ruling of the Court as to each question and answer.
The jury here returned into Court.

I had a hot plate in the Bachmann Building, in my business, which was heated with natural gas. I did not manufacture lubricating oils in the Bachmann Building. The manufacturing process which I conducted there included soap, polishes, certain kinds of greases, and penetrating oil which is used to penetrate into a crack or rusty nut—"a nut loosener" as it is called.

Thereupon, counsel for the defendant moved to strike out and exclude that part of the testimony of this witness

Monday or Tuesday morning. I wanted to find out from Mr. Prince what he knew about the condition of this building and what facts he knew about the case. We went into the Marshall's office and sat down and were there possibly ten or fifteen minutes and during the course of the conversation he said there was a five gallon can of gasoline that he had found on the third floor; I asked him what was done with this can and he said it was brought up here to the Federal Building and put in a room in the prohibition headquarters. Prince said that he did not know what became of this can as it had been a year ago, and that he would have to look it up in his notes. During the progress of this trial I talked again with Mr. Prince in the court room and [fol. 137] asked him about this can of gasoline Thursday or Friday afternoon. He said he had examined his notes and that he now recalled that he took the five gallon can of gasoline and used it himself. In reply to my inquiry as to why he did not tell me on the first day, he said he had refreshed his recollection from his notes.

I was at the fire until about midnight and again the following morning about eight o'clock. I had brought my family from Washington to Wheeling to spend the Christmas Holidays and we were staying at Charles F. Bachmann's home. We were eating supper when the alarm came in. I did not attempt to go into the building and was not on the first floor or any of the other floors. I did climb up the ladder that led to the third floor and saw nothing in the way of gasoline or stills or anything of that kind. I did not look for them but just merely climbed up the ladder to look through into the building. The building was all covered with ice and the floors were fallen in.

CHARLES F. BACHMAN

Is the husband of the plaintiff, who has testified before. Has known defendant's witness George H. Hastings for thirty years. Denies that I come out of the front door of the Bachmann Building about four or five days before the fire, and turned the key, putting it in my pocket, as heretofore testified by Hastings. The lock heretofore introduced in evidence as Plaintiff's Exhibit No. 10—Lock, is the same one which was on the front door of the Bachmann Building

at that time. It is a snap lock and does not require the turning of a key to lock it. The door locks itself by being shut. This lock had been on the door for twenty years or more.

From November 30, 1925, until the time of this fire and after the fire, I did not have a key to the Main Street Building and was never in it. I had given Varisca my key and Mr. Huff had given him his at the same time, on November 30, 1925, at the Riley Law Building. At various times from Thanksgiving Day to the time of the fire in 1925, I tried to get into the building. I went down several times with Edward Diehl and Dr. Hersey, who have testified here, to get some papers and also with Barclay Johnson to get a blue [fol. 138] print and map and Ed. Bachmann, and was never able to get in. I usually went by the front door to brokerage office in morning and at lunch time and often tried the door when nobody was with me. I tried to get into the building the day before the fire and also looked into it on the first floor. I could see clear through the building on the first floor and there was no obstructions at all. There were no gasoline cans on the first floor any day before the fire.

Is acquainted with Mr. W. L. Smith, connected with the Auto Sales Company, who has testified here. Smith is mistaken about having talked to me at my office in the Main Street Building between December 1st and December 10th, 1925. He did not talk to me during the month of December in that building; I had no occasion to talk to him and had moved out of this building. He did talk to me about his lease on this building in the early part of November, 1925, before I moved out. I think Dr. Hersey was with me in the office when Smith came in. I never was in the Main Street Building or talked with Smith there after Thanksgiving Day, 1925.

I never knew of any still, gasoline or any of these other things being in the Main Street Building and never saw any. Nothing occurred that would cause me to suspect these things or that would have put me upon inquiry about them.

Immediately after this fire occurred I employed people to hunt for the tenant. As early as 8:00 o'clock the following morning after the fire. I never could find out or learn anything about him.

It was my custom to walk up and down Main Street going to the brokerage office as well as for other purposes, and I never detected any odors of whiskey, liquor, mash, or similar fumes. I did not know of the presence in the Main Street Building of any of the apparatus, attachments, gasoline compressor, gasoline cans, mash barrels, mash, corn sugar, or any other article mentioned by the witnesses for the insurance company in this case, nor ever saw any of them. The building in which Mr. Huff had his fire was owned by my daughter, Adelaide Stobbs; I never owned it.

I was in the rear of the building on the first floor about 8:00 o'clock the morning following the fire. I went in about forty or fifty feet and even climbed up on the rubbish. The fire was so hot that it had melted the nails on the [fol. 139] corrugated metal ceiling so that it was all hanging down. There were no gasoline cans on the first floor of the building when I got there that morning at eight o'clock. Prior to my leasing of the Main Street Building the back door had no lock on it. It had slats nailed over the door. When talking about leasing the property I had a carpenter put a new lock on and to repair the door; that is the alley door in the rear. One of the keys was left in the rear door on the inside, and the other hung on a nail on the jamb of the door back of the door when opened. These keys were left there when I went out of the building. I do not know who got them. The lock on the rear door was a big old-fashioned lock. I had no keys to get in the building by either door. So far as I know there was no place to enter this building except the alley door and the front door at Main Street.

Cross-examination:

I do not know what moonshine mash smells like. I never drank over a pint of whiskey in all my life, nor have I ever seen a still in my life. Mr. Huff conducted his business on the second floor of the building while he was there.

I could look in either the front door or back door of the Bachmann Building on the first floor and see clear through. There was a glass partition at the rear but you could see through it. The frame work of the partition came up about two feet and a half. This space was an office before we took over the building. When we took the building we ripened bananas there in the produce business.

At this point, the plaintiff rested her case.

Thereupon the defendant, to further maintain the issues upon its part, introduced the following testimony in surrebuttal:

SAMUEL MORRIS

Direct examination:

Is the same Professor of the Department of Chemistry of West Virginia University who has heretofore testified in [fol. 140] this case. I use jet burners with natural gas as fuel in my chemical laboratory, and also use natural gas in my home.

Thereupon, the following testimony of this witness was taken upon direct examination out of the hearing of the jury, objection thereto having been made by counsel for the plaintiff:

"Q. I will ask you to state, from your experience and investigation and study as to the comparative use of natural gas on the one hand, and gasoline on the other hand for heating these jets or burners or hot plates, particularly with reference to what precautions should be taken.

A. In heating with natural gas the chief danger lies in getting a mixture of gas and air, and in the case of using gasoline there is the same danger, of course, with gasoline, but there is the added danger of keeping the supply to be used.

Now, the Bureau of Mines in its pamphlet that I have referred to on hazards in handling gasoline, by George A. Burrough, says that the supply of gasoline to be used in a burner in a building or to be used in a building in any way, especially in use of a burner, should be kept outside of the building, a safe distance from the building and buried underground, and that the gasoline should be pumped—the supply should be pumped into the building through pipes that drain backward to the container. That is, if you pump in for a small supply at the time, if a supply is to be needed, that should be pumped in and not be carried in vessels. And if it is to be carried in vessels, they should be closed vessels, and he says to use as small an amount as possible.

Q. Now, Professor, in your examination the other day, you testified that you had seen the gasoline compressor tanks which were taken from the Bachmann building, or which were pointed out to you as being that?

A. I did.

Q. I believe at that time, Professor, you explained to the jury the method in which the gasoline was gotten from such tanks to the burner. What can you say with respect to the proper or safe location of such a gasoline compressor tank that is to be used to heat open jets or burners?

A. To such a container is attached the statement that this [fol. 141] container should be placed outside the building in which the gasoline is burned.

Q. Just state the reasen for that, if you know. What is the reason for not having the gasoline compressor tank right within a few feet of the open burner?

A. There are several. In the first place, if in filling the containers there is any gasoline spilled that mixes with the air—vitalizes and mixes with the air and forms a dangerous combustible mixture which may float along the floor for several feet, and become ignited.

Q. Do you mean when filling the burner?

A. When filling the tank, I mean. If any gasoline is spilled or any should leak out, there is danger of ignition from an open burner.

Q. From your observation and examination of these gasoline compressor tanks which were pointed out to you as having been the ones involved in this case, how could they be filled? What manner was there or apparatus was there for filling the tanks?

A. The only way of filling is to take off the cap and pour the liquor in.

Q. The cap on top of the tank?

A. Yes."

Thereupon the defendant moved that each of the foregoing questions and answers taken in the absence of the jury be read to the jury, which motion the plaintiff resisted; the court overruled the said motion and refused to permit the said questions and answers to be read to the jury, or to permit the jury to hear the same, to which ruling of the court as to each of said questions and answers the defendant duly excepted. And in excluding said evidence, the Court said:

"The Court: Gentlemen, the first specification of defense here sets up certain conditions—"Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring while the hazard is increased by any means within the control or knowledge of the assured.

Mr. Guiher's question has been practically passed upon by the Supreme Court of Montana in June of this year, in the case of Fayle vs. Camden Fire Insurance Association, 278 Pac. 509. Also by the Supreme Court of Kentucky in Obermeyer vs. Phoenix Insurance Company, 290 S. W. 500, [fol. 142] and Colker vs. Connecticut Fire Insurance Company, 290 S. W. 1073, and by the Supreme Court of Washington, in Ragley vs. Northwestern National Insurance Company, 276 Pac. 537. Each of these cases is stronger than the state of facts presented here. * * *

Gentlemen, I am constrained to sustain*ed* the objection.

Exception by defendant."

RUSSELL L. FURBEE

Direct examination:

Is a practicing attorney residing at Fairmont, West Virginia, and is one of counsel for the defendant St. Paul Fire & Marine Insurance Company in this case. I became acquainted with Ashby Jackson, who testified in this case for the plaintiff, about six years ago, and about ten days after the fire at the Bachmann Building I had a talk with Ashby Jackson, at the Federal Prohibition office in the City of Wheeling, regarding what he had found or observed at the scene of the fire. At that time, I was Assistant United States Attorney for the Northern District of West Virginia, and I was helping the Government make an investigation as to who owned the stills and who was responsible for the apparatus found in the building after the fire which was designed and intended to be used in the manufacture of liquor.

Thereupon, the following question was asked the witness and answer returned thereto:

"Q. At the time of your conversation with Mr. Jackson, did he make any statement to you, or in your hearing with respect to approximately twenty-five five-gallon cans of gasoline which had been alleged to be on the first floor in the rear of the Bachmann building and found there immediately after the fire?

A. Yes, at that time I was interrogating him, and I asked him—I want to preface by stating that he had previously told me that he and Elmer Faddis had been the first two into the first floor of 1312 Main Street when he responded to the [fol. 143] alarm, that Faddis carried the hose in, and he recited exactly, as he said, on the witness-stand in this suit, that when he went in, Faddis preceded him in, what they discovered, and somebody yelled to them they had better get out because the floor was going to fall, and he grabbed hold of the hose, and Faddis had hold of the other end, and they started out, and as they started out with it—this was his statement to me—in December or early January, 1926—that the hose fell over a lot of cans along the side of the partition, and that he did not stop to examine any of the cans, that he was busy getting the hose out, and that he never had examined the contents of the cans, and he did not after the fire examine the contents of the cans, and could not at that time tell me what the cans had contained."

I was making this examination as an official representative of the Government of the United States. Ordinarily witnesses for such an investigation are sent for through the office of the United States Marshal or other Federal officers, but in this instance the summoning of Ashby Jackson and Elmer Faddis was done through the Prohibition officers. Other Government officers were there and our questioning was done for the purpose of securing evidence for use by the Government.

At this point the defendant rested its case.

MOTIONS TO EXCLUDE TESTIMONY, ETC.

Thereupon the defendant moved the court to exclude, and to direct the jury to disregard, all of the testimony of the plaintiff's witnesses A. S. Whitely, Edward Bachmann, William Gutman, Ira P. Huff, Carl G. Bachmann and

Charles F. Bachmann as heretofore shown in this narrative, in so far and in so far only as the testimony of each of said witnesses related to the business being conducted in the Bachmann Building by said Huff prior to the fire and the various materials described as having been used in said business, as well as what the representatives of the Insurance Companies were shown on their visits there regarding said materials and ingredients. This motion to exclude was resisted by the plaintiff, and the court overruled said motion and refused to strike out said testimony or any part thereof, or to instruct the jury to disregard the same, to [fol. 144] which action and ruling of the court as to each and every part of said testimony, the defendant duly excepted.

Thereupon the plaintiff moved the court to exclude all of the testimony of the defendant's witness Mrs. Ellen Weidner, which motion was overruled by the court, and to said ruling the plaintiff duly excepted.

Thereupon the plaintiff withdrew her objections heretofore made to the testimony of the witness Elmer Faddis. The plaintiff also withdrew her objections to and motions to exclude the testimony of the defendant's witnesses August Forsch and Mrs. August Forsch.

And the court now certifies that the foregoing was all of the evidence and testimony adduced at the trial of this case and all of the evidence heard by the jury.

The plaintiff and the defendant having now rested their respective cases, the defendant moved the court to exclude all of the plaintiff's testimony and to direct a verdict for the defendant. Likewise the plaintiff moved the court to exclude all of the defendant's evidence and to direct a verdict in favor of the plaintiff. Thereupon, while the court was considering these two motions but before any decision had been reached or announced by the court, the defendant asked leave of the court to withdraw its said motion for a directed verdict. After having taken the matter under advisement, the court thereupon permitted the defendant to withdraw its said motion for a directed verdict, and the same was withdrawn, to which action and ruling of the court in permitting defendant's said motion to be withdrawn the plaintiff duly excepted.

Thereupon the court overruled the motion made by the plaintiff to exclude the defendant's evidence and to direct

a verdict in favor of the plaintiff, to which action and ruling of the court the plaintiff duly excepted.

Thereupon the plaintiff tendered to the court and requested the court to incorporate in its charge to the jury the following several instructions in writing, to-wit:

PLAINTIFF'S REQUESTED INSTRUCTIONS

"Plaintiff's Instructions No. A

With respect to the requirement that the defendant must prove its specifications of defense by a preponderance of the evidence, the court charges the jury that you are to consider all of the testimony and it is the defendant's duty to [fol. 145] establish its case by a preponderance of the evidence, and the jury will return a verdict for the plaintiff if the evidence is clearly balanced, or if it preponderates for the plaintiff or if you are in doubt as to the preponderance. The burden of proof is not on the plaintiff to prove that the defendant's specifications of defense are not true but it is upon the defendant, the Insurance Company to prove that its specifications of defense are true, and if the preponderance does not show the truth of the matters specified in the said specifications of defense, the verdict of the jury should be for the plaintiff."

"Plaintiff's Instruction No. 1

The jury are further charged by the Court that the defendant has set out the grounds of defense upon which it depends to defeat liability in this action and these grounds of defense are that some time prior to the said fire, to-wit, upon the 1st day of November, 1925, the insured building was leased by the plaintiff, through her duly authorized agent, or agents, to one, Bill Varisca, for the term of eighteen months; that at the time of the fire and prior thereto, the said Bill Varisca and some associates were operating upon and about the insured premises one or more moonshine stills for the manufacture of intoxicating liquor; that the operation of said stills upon said premises was in express violation of the Prohibition and other laws of the United States as well as of the State of West Virginia, and

thereby subjected the said Bill Varisca and his associates in case of discovery to the danger of heavy fines and imprisonment; that in order to avoid detection and arrest, the said parties operating said stills had to carry on their activities in and about said premises in a surreptitious and guarded manner and for the most part during the nighttime with the result, among other things, that in case of an outbreak of fire, the usual and proper methods for giving warning thereof and for the establishment of the same could not and would not be used by the said occupants of the building and that in many other ways said unlawful, illegal and criminal use of the insured premises created a constant and material increase in the fire hazard thereto, and caused or contributed to the fire complained [fol. 146] of and that all of said facts were then and there known to the said plaintiff and her agent, the said Charles F. Bachmann. You are charged by the Court that the burden of proving said facts rests upon the defendant Companies and that such proof must be made by a preponderance of the evidence and that not only must the said defendant Insurance Company prove said facts by a preponderance of the evidence but it must also prove by a preponderance of the evidence that the said Sophia C. Bachmann, or her agent, the said Charles F. Bachmann, actually had knowledge thereof and unless the said Insurance Company has so proven said facts and proven such knowledge, it has not established the said assignment of its defense.

You are further charged by the Court that as a matter of defense to its liability in this case, the said Insurance Company has also assigned the grounds that the said moonshine still or stills were in themselves highly dangerous instrumentalities, on account of the inflammable, combustible and explosive substances used in and about their operation; that especially the operation of said stills carried with it the constant danger of an explosion and fire resulting therefrom, and that the fire hazard to the insured building was greatly increased thereby and in fact caused or contributed to the fire herein complained of, all of which facts must be proven by the defendant by a preponderance of the evidence, that is, that the still or stills if they were then in the building were in themselves highly dangerous instrumentalities; that on account of the inflammable, combustible and explosive substances used in and about their operation,

relating to the process of manufacturing automobile oils conducted by him in the Bachmann Building, some time prior to the fire and the materials used there, including the testimony relating to the visit of the insurance representatives, which motion was overruled by the Court and to the action and ruling of the Court the defendant duly excepted as to each part of said testimony.

Redirect examination:

The insurance suits which I have pending are none of them againts the defendant St. Paul Fire & Marine Insurance Company. When I was conducting the business in the Bachmann Building the gasoline was used as a driver in the penetrating oil, to cut rust. The building in Wheeling in which I had my fire was owned by Charles F. Bachmann's [fol. 135] daughter and not by Bachmann himself. Since I was dealing with Mr. Bachmann I just referred to him as owner of the building.

EMIL STUMPP

Direct examination:

Is a butcher with place of business located on Market Street, Wheeling. I was at the fire at the Bachmann Building and on the following day. On the morning following the fire about half past 7:00, I went to the first floor of the Bachmann Building, a distance of about fifteen or twenty feet across the alley from where my place of business was. I did not see or notice any gasoline or gasoline cans on the floor that morning when I went there. The first floor had a metal ceiling and it had caved in. I did not go on the other floors of the building.

CHARLES C. COLEMAN

Direct examination:

Is a salesman for the Palace Furniture Company which occupied the building two doors north of the Bachmann Building on Main Street. I went to the rear of the Bachmann Building on the morning following the fire and went

inside as far as the place where the ceiling had caved down and looked around to see if I could see what caused the fire. I was in a position to see what was on the first floor. I did not see any gasoline or gasoline cans and I was in a position to see them if they had been there. The first floor had a metal ceiling. The ceiling near the rear of the building seemed to be intact but towards the center it had caved in.

CARL G. BACHMANN

Direct examination:

Is one of counsel for the plaintiff in this case and is a son of the plaintiff and Charles F. Bachmann. Has been a [fol. 136] member of Congress for the last five years. Prior to Thanksgiving Day, 1925, my father had his office in the building on Main Street. I left for Washington on Thanksgiving Day and my office was then in rooms 600 and 601, in the Riley Law Building. My father, Charles F. Bachmann, took possession of my office when I left and paid the rent of that office until I returned about July, 1926.

While Huff was in the Main Street building making the automobile products I went down there one afternoon and saw several barrels containing oil of some kind and also gasoline cans. I saw where oil had been dripping on the second floor. There was a scum of dirt practically all over that second floor and always had been since candy was manufactured in that building prior to these occupancies, and it was slippery on the floor where oil had dripped down in the process of that business. I suggested to Charles F. Bachmann that he send for the agents of the insurance companies, including Mr. Campbell, and have riders attached to the policies. This was shortly after Huff had come into the building, in the spring or summer of 1925, probably along in the early part of 1925. I assume Huff had been there possibly a month carrying on the business.

I am very well acquainted with Alonzo Prince, one of the witnesses who has testified here for the defendant, and I have had two conversations with him regarding the five gallon can of gasoline said to have been found by him on the third floor. The first conversation was in the Marshall's office in the Federal Building in Wheeling on last

that the operation of said stills carried with it the constant danger of an explosion and fire resulting therefrom which assignment of grounds of defense requires the Insurance Company to prove by a pre-onderance of the evidence that the stills at that time were actually in operation; that the defendant is further required to prove by a preponderance of the evidence that not only the stills themselves were actually in operation but that such operation was carried on in such a manner that the fire hazard to the building was greatly increased and the defendant is also required to prove by a preponderance of the evidence that such operation in fact caused or contributed to the fire complained of and in addition the defendant company is required to prove [fol. 147] by a preponderance of the evidence all these facts but the defendant Insurance Company is also required to prove by a preponderance of the evidence that all of said facts were within the control or knowledge of the said Sophia C. Bachmann and/or her agent, Charles F. Bachmann.

The said defendant has also assigned as grounds of defense that in connection with the operation of said moonshine still or stills, the said Bill Varisca and his associates necessarily used large quantities of gasoline, mash and other highly combustible, inflammable and explosive substances as well as open and unprotected flames and fires, all of which greatly increased the fire hazard to the said insured building and directly caused or contributed to the fire of which the plaintiff complains in this action. With respect to these last assignments of defense, the Court charges you that the defendant Insurance Company must prove the same by a preponderance of the evidence and even though it has proven such facts by a preponderance of the evidence, still the defendant Company would be liable herein unless it has also proven by a preponderance of the evidence that the said plaintiff, Sophia C. Bachmann, or Charles F. Bachmann, her agent, had control or knowledge of said facts at and before the time of the fire."

"Plaintiff's Instruction No. 2

The jury are further charged by the Court that under the second Assignment of Grounds of Defense, the said defendant Insurance Company must prove by a preponderance of the evidence that at the time of the fire complained of and

prior thereto large quantities of gasoline, explosives, mash and other highly combustible and inflammable substances were being kept, used and allowed upon and about the insured premises and that such keeping, using and allowing of gasoline was well known to the plaintiff, Sophia C. Bachmann, and/or Charles F. Bachmann, her agent, and unless the said defendant has proven by a preponderance of the evidence the presence of gasoline, explosives, mash and other highly combustible and inflammable substances upon said premises at and before the time of the fire and has also proven by a preponderance of the evidence that such keeping, using and allowing was well known to the plaintiff, [fol. 148] Sophia C. Bachmann, and/or Charles F. Bachmann, her agent, such keeping, using and allowing of gasoline on said premises constitutes no defense for the defendant Company in this action."

"Plaintiff's Instruction No. 3

The jury are charged by the Court that the fact alone that Bill Varisca either alone or with any associates may have operated liquor stills upon the insured premises and that the fire which destroyed said premises was caused by or through the operation of said stills does not relieve the defendant insurance company from liability under its policy sued upon in this case but in order that the said insurance company may be so relieved it is incumbent upon said insurance company to prove to your satisfaction by a preponderance of the evidence that the said plaintiff, Sophia C. Bachmann, or her agent, Charles F. Bachmann, had control or knowledge of the said liquor still operations and if the said plaintiff and/or her said agent did not have such control or knowledge then notwithstanding the fact that said stills were so operated your verdict should be for the plaintiff."

"Plaintiff's Instruction No. 3-A

The Court further charges the jury that the words "within the control or knowledge of the insured" as used in these instructions means that the insured must have actual knowledge as the word "control" involves reasonably and fairly some knowledge of the hazardous use of the premises and it is not enough to show that the insured, the

plaintiff in this case, had the means of knowledge, but it is incumbent upon the defendant in this case to prove by a preponderance of the evidence that the insured, the plaintiff in this case or her agent, actually had knowledge of the facts relied on as a defense in this action."

"Plaintiff's Instruction No. 4

The jury are charged by the Court that even though you may believe from the evidence that at and prior to the time of the fire complained of quantities of gasoline were being [fol. 149] kept or used upon the premises described in the policies of insurance either for the operation of stills or for any other purpose and even though you may believe that at the time — the fire in question, stills were actually being operated upon the premises destroyed by fire, yet the Court charges you that such keeping and using of gasoline and such operation of stills — that if neither the said plaintiff, Sophia C. Bachmann, nor her agent, the said Charles F. Bachmann, had any knowledge or control of such keeping and using of gasoline or such operation of stills, such keeping, using and operation will not invalidate the insurance policy issued by the defendant and sued on in this case. That is to say that unless the plaintiff, Sophia C. Bachmann, or her agent, the said Charles F. Bachmann, had control or knowledge of the keeping and using of such gasoline or the operation of such stills, such keeping, using and operation under such circumstances constitute no defense for the defendant company."

"Plaintiff's Instruction No. 5

The Court instructs the Jury that the policy of insurance described in the evidence in this case was duly and regularly issued to Sophia C. Bachmann and that the premiums were duly and regularly paid to the defendant insurance company by the said Sophia C. Bachmann and that the property was afterward destroyed by fire as described in the evidence and the Court further instructs you that if you believe from the preponderance of all the evidence in this case that the plaintiff has fairly and reasonably complied with all the terms of the policy of insurance and has not been guilty of a breach of any of the terms of said policy of insurance then you are instructed as a matter of law that the plaintiff

is entitled to recover in this case and your verdict should be for the plaintiff."

"Plaintiff's Instruction No. 6

The jury are charged by the Court that the evidence and testimony in this case now before you gentlemen of the jury discloses and establishes that the Defendant Company issued and delivered to the plaintiff, Sophia C. Bachmann, [fol. 150] the policy of insurance sued on in this case; that Sophia C. Bachmann duly paid the premiums required therefor; that the said policy was in full force and effect upon December 27, 1925; that upon said last mentioned date, the said insured premises were completely destroyed by fire as the result of which the plaintiff sustained a loss not less than $3,784.49 the amount of said policy; that thereafter duly and seasonably the plaintiff made out and filed with the defendant the required Proofs of Loss. Under these circumstances, you are charged by the Court that unless the defendant has proven by a preponderance of the evidence that within the control or knowledge of the said plaintiff the fire hazard upon said premises was increased and/or that quantities of gasoline were kept and used upon said premises, your verdict shall be for the plaintiff."

"Plaintiff's Instruction No. 7

The Court further charges you that while as a matter of fact the insurance policies in question provide that if the hazard insured against by the said insurance policy is increased by any means within the control or knowledge of the insured or if gasoline is kept, used or allowed upon the insured premises then in either event, the said defendant Company shall not be liable, yet you are also charged by the Court that before the defendant Company can escape liability on account of such increased hazard or on account of such keeping, using and allowing of gasoline on the insured premises, such increase of hazard and such keeping, using or allowing of gasoline on said premises must be within the control or within the knowledge of the plaintiff, Sophia C. Bachmann or her agent, Charles F. Bachmann."

"Plaintiff's Instruction No. 8

The jury are charged by the Court that the evidence and testimony in this case now before you Gentlemen of the jury discloses and establishes that the defendant company issued and delivered to the plaintiff, Sophia C. Bachmann, the policy of insurance sued on in this case; that Sophia C. Bachmann duly paid the premiums required therefor; that [fol. 151] the said policy was in full force and effect upon December 27, 1925; that upon said last mentioned date the said insured premises were completely destroyed by fire as the result of which the plaintiff sustained a loss of $3,784.49, the amount due on said policy; that thereafter duly and seasonably the plaintiff made out and filed with the defendant the required Proofs of Loss. You are also charged by the Court that unless the defendant has proven by a preponderance of the evidence that within the control or knowledge of the said plaintiff the fire hazard upon said premises was increased by the operation of a liquor still on the premises then your verdict shall be for the plaintiff since the defendant by the issuance of the rider described in the evidence as having been attached to the policy here sued on is estopped to avoid the policy because of the fact that quantities of gasoline were kept and used upon the premises since the said rider permitted the bottling of automobile oils which according to the uncontradicted evidence contained gasoline."

"Plaintiff's Instruction No. 9

The Court instructs the jury that the evidence is uncontradicted that the defendant Insurance Company, through its agent, Alexander Campbell, knew that gasoline was kept on the premises mentioned and described in the insurance policy in this case. The Court, therefore, instructs you that for this reason the defendant Insurance Company waived the provision in the policy prohibiting the keeping, using and allowing gasoline on the premises and is estopped to set this provision up as a defense. The evidence is equally uncontradicted that the Insurance Company by executing and affixing to the policy the rider described in the evidence permitting the plaintiff to bottle automobile oils described in the insurance policy in this case and that such automobile oils contained gasoline and

the Court, therefore, instructs you as a matter of law that the defendant Insurance Company thereby waived the provision in the policy prohibiting the keeping, using or allowing gasoline on the premises in question and the defendant is, therefore, estopped to set up a violation of this provision as a defense to this action. The Court, there-
[fol. 152] fore, instructs you that there is but one issue in this case and that is whether or not the plaintiff, or her agents, actually had knowledge that the risk insured against was increased by the maintenance and operation of a liquor still on the premises described in the insurance policy in this case. Therefore, in this case unless you believe from a preponderance of the evidence that a liquor still was maintained and operated on the premises described in the evidence and further believe that the def-ndant insuranc- company, by a preponderance of the evidence has established that the plaintiff, or her agent, had actual knowledge of the maintenance and operation of the liquor still in question, then you are instructed as a matter of law that your verdict cannot be for the defendant but that your finding must be for the plaintiff, Sophia C. Bachmann."

"Plaintiff's Instruction No. 10

To sum up and state briefly and concisely the law applicable to the main issue in this case, you are charged by the Court that the defendant Insurance Company cannot escape liability in this action unless it has proven to your satisfaction by a preponderance of the evidence that either the said Sophia C. Bachmann or her agent, the said Charles F. Bachmann, had knowledge of the matters and things alleged by the defendant to have been done and performed by Bill Varisca and/or his associates and if on the contrary, you believe from the evidence that neither the said Sophia C. Bachmann, or her agent, the said Charles F. Bachmann, had any control or knowledge of such matters and things, then your finding must be against the defendant Insurance Company and in favor of the plaintiff, Sophia C. Bachmann."

And to the giving of the aforesaid instructions tendered by the plaintiff, and each of them, except plaintiff's said instruction No. 5, the defendant duly objected.

And thereupon the defendant tendered to the court and requested the court to incorporate in its charge to the jury the following several instructions in writing to-wit:

[fol. 153] DEFENDANT'S REQUESTED INSTRUCTIONS

"Defendant's Instruction No. 1

The court charges the jury that if you believe from the evidence in this case that, at and prior to the time of the fire complained of, substantial quantities of gasoline were being kept, used or allowed upon the premises described in the policy either for the purpose of operating moonshine stills or for any other purpose not permitted by the policy sued upon, then you must find for the defendant, even though you may further believe from the evidence that such gasoline did not in any way cause or contribute to the fire in question, and that neither the plaintiff Sophia C. Bachmann or her husband Charles F. Bachmann had any actual knowledge or notice of the presence of such gasoline upon the insured premises."

"Defendant's Instruction No. 1-A

The court charges the jury that if you believe from the evidence that, at and prior to the time of the fire complained of, gasoline was being kept, used or allowed upon the premises described in the policy, by the tenant Bill Varisca or by some other person or persons by and with the knowledge and consent of said tenant, either for the purpose of operating moonshine stills or for any other purpose not permitted by the policy sued upon, then you must find for the defendant, even though you may further believe from the evidence that such gasoline did not in any way cause or contribute to the fire in question, and that neither the plaintiff Sophia C. Bachmann or her husband Charles F. Bachmann had any actual knowledge or notice of the presence of such gasoline upon the insured premises."

"Defendant's Instruction No. 1-B

The court charges the jury that if you believe from the evidence in this case that, at and prior to the time of the

fire complained of herein, quantities of gasoline were being kept, used or allowed upon the premises described in the policy, by the tenant Bill Varisca or by some other person or persons by and with the knowledge and consent of said tenant or of the said plaintiff, either for the purpose of operating moonshine stills or for any other purpose [fol. 154] not permitted by the policy sued upon, then you must find for the defendant, even though you may further believe from the evidence that such gasoline did not in any way cause or contribute to the fire in question."

"Defendant's Instruction No. 1-C

The court charges the jury that if you believe from the evidence that, at and prior to the time of the fire complained of, quantities of gasoline were being kept, used or allowed upon the premises described in the policy, by the tenant Bill Varisca or by some other person or persons by and with the knowledge and consent of said tenant, either for the purpose of operating moonshine stills or for any other purpose not permitted by the policy sued upon, then you must find for the defendant, even though you may further believe that neither the plaintiff Sophia C. Bachmann or her husband Charles F. Bachmann had any actual knowledge or notice of the presence of such gasoline upon the insured premises."

(NOTE.—The foregoing instructions Nos. 1, 1-A, 1-B and 1-C were tendered to the court as a series; that is, the court was requested in the first instance to give defendant's said instruction No. 1, and in the event of its refusal, to give said instruction No. 1-A, and in the event of refusal to give No. 1 and No. 1-A, then to give No. 1-B, and if Nos. 1, 1-A and No. 1-B were refused, then to give No. 1-C.)

"Defendant's Instruction No. 2.

The court charges the jury that under the circumstances as shown by the evidence in this case, if you believe that the plaintiff's husband, Charles F. Bachmann, had any knowledge or notice of the presence, use or operation in the insured building, of any moonshine still or stills, or of the presence or use therein of any of the articles pro-

hibited by the plaintiff's policy, then such knowledge or notice can and should be imputed to the plaintiff Sophia C. Bachmann as the owner of said building.

[fol. 155] "Defendant's Instruction No. 3

The court charges the jury that if gasoline was being kept, used or allowed upon the premises described in the policy at the time of the fire, in violation of the terms of the policy, it is not incumbent upon the defendant to prove, in order to establish a forfeiture of the policy, that such gasoline in any way caused or contributed to the fire in question."

"Defendant's Instruction No. 4

The court charges the jury that if you believe from the evidence that gasoline was being kept, used or allowed upon the premises described in said policy at the time of the fire, in violation of the terms of the policy, it is not incumbent upon the defendant in this case, in order to show a forfeiture of said policy, to prove that either the plaintiff Sophia C. Bachmann or her husband Charles F. Bachmann had any actual knowledge or notice of the presence or use of such gasoline in the insured building."

"Defendant's Instruction No. 5

The court charges the jury that if you believe from the evidence that the fire hazard to said property was being increased as alleged in defendant's specifications of defence, at and prior to the time of the fire complained of, by any means within the knowledge or control of the plaintiff Sophia C. Bachmann or her husband Charles F. Bachmann, including any dangerous use or occupation of said building which in your judgment increased the *the* fire hazard in violation of the terms of plaintiff's policy, and that such increase in hazard, if any, caused or contributed to the fire and loss which occurred on the 27th day of December, 1925, then you must find for the defendant."

"Defendant's Instruction No. 6

The court charges the jury that if you believe from the evidence that, at and prior to the time of the fire, one or more moonshine stills were being kept, operated or used upon the insured premises; that such presence, use or

[fol. 156] operation of such stills increased the fire hazard to plaintiff's building, and whether by explosion or otherwise, caused or contributed to the fire in question; and that the plaintiff or her husband, Charles F. Bachmann, prior to and at the time of the fire, knew of the presence or use of such stills upon the premises, or had reasonable cause to believe or know that such apparatus was being there so used or operated, then you must find for the defendant, even though you may further believe that neither the plaintiff nor her said husband had any interest in said stills, or had in any way whatever participated in the purchase, use or operation thereof."

"Defendant's Instruction No. 7

The court charges the jury that this is not a criminal case, and that it is therefore not incumbent upon the Insurance Company to prove, beyond a reasonable doubt, that the plaintiff or her husband, Charles F. Bachmann had knowledge or notice of any condition prevailing in the insured building, as alleged in defendant's specifications of defense at and prior to the time of the fire, which may have increased the fire hazard to the insured premises. It is only incumbent upon the Insurance Company to prove such knowledge or notice by a preponderance of the evidence, and in determining this question of fact, you have the right to consider all of the circumstances as shown by the evidence."

And to each of the said instructions tendered by the defendant, the plaintiff duly objected, except as to said defendant's instruction No. 2.

After having taken time to consider the several instructions so offered by the plaintiff and the defendant as aforesaid, and after having heard the argument of counsel thereon, the court announced that it would incorporate in its charge to the jury all of the plaintiff's instructions aforesaid, save and except plaintiff's instructions Nos. 3-A and 9, which would be refused, and that the court would refuse to give to the jury all of defendant's said instructions, save and except defendant's instructions Nos. 2, 5 and 7, which would be given. Thereupon, the plaintiff duly

excepted to the overruling by the court of its objections to [fol. 157] defendant's instructions Nos. 5 and 7, as aforesaid (no objection having been made to defendant's instruction No. 2), and the defendant likewise then and there duly excepted to the action of the court in overruling its several objections to the giving of the plaintiff's instructions and each of them (except as to the two instructions of the plaintiff refused as aforesaid, and except as to plaintiff's instruction No. 5 to which there was no objection made); and the defendant likewise then and there excepted to the action of the court in sustaining the objections of the plaintiff to the giving of defendant's said instructions Nos. 1, 1-A, 1-B, 1-C, 3, 4 and 6, and each of them.

And having thus considered and passed upon the several instructions thus offered by the plaintiff and the defendant, the court thereupon charged the jury in the words and figures following (the portions of the charge below covering the several instructions given on behalf of the plaintiff and defendant, as aforesaid, are here identified, so as to indicate clearly the exceptions taken thereto by the parties as shown below):

CHARGE TO JURY

"GENTLEMEN OF THE JURY: You are to be congratulated that we have now come to the end of what has been a long and somewhat tedious trial. Cases of this nature are necessarily long, but I want to compliment this jury upon the careful, painstaking way in which you have listened to four solid days of the testimony, sitting from early in the morning until six o'clock and after six o'clock in the evening. The Court usually tries to go over the entire evidence of a case and sum it up for the jury, but after seeing the way you have listened to this evidence, and to the able arguments of two hours, in which every feature and phase of the evidence was called to your attention in detail, I do not feel called upon to go over this evidence, but shall satisfy myself by giving you the principles of law that shall govern you when you return to your room to consider of your verdict. And the law, as given you by the Court, and the evidence as you heard and remember it, shall be the basis of your verdict. In other words, lay the evidence squarely down on the table and use the law, as given you by the Court, as the

straight edge by which it shall be measured, and by a combination of the law, given you by the Court, and the evi-
[fol. 158] dence as you heard it and remembered it, bring in your verdict.

Speaking of remembering the evidence, I call you- attention to the fact that you gentlemen are the sole judges of the weight and credibility of the testimoney in this case, and in weighing the testimony, the evidence of all witnesses is to be weighed and considered under the same rule, and in considering the evidence of all witnesses you may take into consideration their demeanor on the stand and the reasonableness or unreasonableness of their testimony, and, in connection with all the surrounding conditions, if you believe any of the persons testifying in this case have testified falsely you may believe such part of such testimony as you believe to be true, and reject such part as you believe to be false. For it is a matter for you to determine from all the testimony taken and the demeanor of the witnesses whether witnesses have testified truthfully, and what ones, if any, have testified falsely.

District Clerk's Note

Plaintiff's Instruction No. A (page 144 of this record) was read to the jury.

Plaintiff's Instruction No. 1 (page 145 of this record) was read to the jury.

Plaintiff's Instruction No. 2 (page 147 of this record) was read to the jury.

Plaintiff's Instruction No. 3 (page 148 of this record) was read to the jury.

Plaintiff's Instruction No. 4 (page 148 of this record) was read to the jury.

Plaintiff's Instruction No. 5 (page 149 of this record) was read to the jury.

Plaintiff's Instruction No. 6 (page 149 of this record) was read to the jury.

Plaintiff's Instruction No. 7 (page 150 of this record) was read to the jury.

[fol. 159] Plaintiff's Instruction No. 8 (page 150 of this record) was read to the jury.

"On Behalf of the Defendant

Defendant's Instruction No. 2 (page 154 of this record) was read to the jury.

Defendant's Instruction No. 5 (page 155 of this record) was read to the jury.

Defendant's Instruction No. 7 (page 156 of this record) was read to the jury.

"In other words, gentlemen of the jury—Plaintiff's Instruction No. 10 (page 152 of this record) was read to the jury.

Now, gentlemen of the jury, it is agreed by and between counsel, as there are some calculations as to the amount due on this policy on account of a small deduction, you may bring in a verdict for the plaintiff saying, "We, the jury, find for the plaintiff and assess the damages at $—," or you may bring in a verdict, "We, the jury, find for the defendant". In case the finding should be for the plaintiff, counsel will agree as to the amount."

PLAINTIFF'S EXCEPTIONS TO CHARGE

Thereupon the plaintiff duly excepted upon the record to the foregoing charge of the court in the following particulars, to-wit:

1. To that part of the charge incorporating therein defendant's said Instruction No. 5, as aforesaid, in its entirety, and particularly on the grounds that this instruction allows the jury to speculate on what is an increase of fire hazard and also that the fire hazard may have been increased prior to the fire and was not in existence at the time of the fire.

2. To that portion of the court's charge incorporating defendant's said Instruction No. 7 in its entirety, and also on the ground that the suggestion is made therein that a criminal proceeding has been or may be instituted against the plaintiff.

[fol. 160] 3. To the refusal of the court to incorporate in its said charge to the jury plaintiff's said Instructions Nos. 3-A and 9, and each of them.

Thereupon, the defendant duly excepted upon the record to the foregoing charge of the court to the jury in the following particulars thereof, and each of them, to-wit:

1. To the action of the court in incorporating in said charge plaintiff's Instruction No. A in its entirety.

2. To the incorporation by the court in its said charge of plaintiff's said Instruction No. 1. The defendant excepted to the giving of said instruction in its entirety, and also to the parts thereof requiring the defendant to prove that the stills in the Bachmann Building were actually in operation, and also the part thereof requiring the defendant to show that the presence or operation in said building of gasoline or moonshine stills was within the control or knowledge of the plaintiff or her agent, Charles F. Bachmann.

3. To that portion of the charge incorporating plaintiff's said Instruction No. 2, in charging the jury that the keeping, using and allowing of gasoline on the premises must have been well known to the plaintiff or her agent, Charles F. Bachman. At the bottom of said instruction the defendant made the following notation: "Objected to by defendant and exception by defendant to giving. J. M. G."

4. To that portion of the charge incorporating plaintiff's Instruction No. 3 which required the defendant to prove that any moonshine stills upon the premises must have been within the control or knowledge of the plaintiff or her agent, Charles F. Bachmann. At the bottom of said instruction, the defendant made the following notation: "Objected to by defendant and exception by defendant to giving. J. M. G."

5. To that portion of the court's charge incorporating plaintiff's Instruction No. 4 in its entirety, and especially as to that part thereof requiring the defendant to prove [fol. 161] that the plaintiff or her agent, Charles F. Bachmann, had control or knowledge of the keeping or using of gasoline or moonshine stills upon the insured premises.

6. To that portion of the court's charge incorporating plaintiff's said Instruction No. 6 in its entirety, and particularly as to that portion of said instruction which told

the jury that "the said policy was in full force and effect upon December 27, 1925", and the portion thereof requiring the defendant to prove by preponderance of the evidence that any gasoline kept or used upon the premises was within the control or knowledge of the plaintiff.

7. That portion of the court's charge incorporating plaintiff's said Instruction No. 7 in its entirety, and particularly as to that part thereof requiring the defendant to prove that the keeping, using or allowing of gasoline on the insured premises was within the control or knowledge of the plaintiff or her agent, Charles F. Bachmann.

8. To that portion of the Court's charge incorporating plaintiff's said Instruction No. 8, said instruction being objected to in its entirety, and also because it charged the jury that "the said policy was in full force and effect upon December 27, 1925", because it required the defendant to prove control or knowledge on the part of the plaintiff as to any moonshine stills or gasoline upon the insured premises, and because it charged the jury that the defendant was estopped from avoiding liability on the policy because quantities of gasoline had been kept and used upon the premises following the issuance of the rider on the policy permitting the bottling of automobile oils. At the bottom of this instruction, the defendant made the following notation:

"Objection by defendant, and exception by defendant to giving, both as a whole, and as to part charging that "the said policy was in full force and effect on December 27, 1925", and that part of charge as to estoppel of defendant on account of rider on policy. J. M. G."

9. To that portion of the Court's charge incorporating said plaintiff's Instruction No. 10, said instruction being [fol. 162] excepted to in its entirety and in so far as it charges that the defendant must prove by a preponderance of the evidence that either the plaintiff or her agent, Charles F. Bachmann, had knowledge of the matters and things alleged to have been done and performed upon the insured premises by the tenant Bill Varisca or his associates. At the bottom of this instruction, defendant made the following notation: "Objected to by defendant and exception by defendant to giving."

10. To the refusal and failure of the Court to embody in its said charge to the jury defendant's said Instructions Nos. 1, 1-A, 1-B, 1-C, 3, 4 and 6, and each of them.

VERDICT

And thereupon the jury, having heard the argument of counsel and the foregoing charge of the court, retired to their room to consider of their verdict, and after some time returned into Court, and upon their oaths did say:

"We, the jury, find for the plaintiff and assess her damages at $4,591.84.

A. D. Peake, Foreman."

MOTION FOR NEW TRIAL

Thereupon the defendant moved the Court to set aside the said verdict of the jury, and to grant it a new trial herein, which motion, having been considered by the court, was overruled, and to said action and ruling of the court, in refusing to set aside the verdict of said jury and to grant the defendant a new trial herein, and in overruling its said motion for a new trial, the defendant then and there duly excepted.

Thereupon the court entered judgment in favor of said plaintiff and against said defendant upon the said verdict of the jury, to which action of the court in rendering judgment upon said verdict the defendant then and there duly excepted.

ORDER SETTLING BILL OF EXCEPTIONS

And the defendant having thus duly preserved its exceptions in the matters aforesaid, prayed that this, its bill of exceptions containing a narrative of the evidence and testimony and the charge of the Court, might be settled, signed, sealed and saved unto it, and made a part of the record herein, which is now accordingly done on this the [fol. 163] 3rd day of February, 1930, and within ninety

days from the date on which the said final judgment herein was rendered.

W. E. Baker, Judge of the United States District Court for the Northern District of West Virginia. (Seal.)

O. K.—Jany. 30, 1930.

J. Bernard Handlan, of Counsel for Sophia C. Bachmann.

O. K.

Steptoe & Johnson, James M. Guiher, Counsel for St. Paul Fire & Marine Ins. Co.

IN UNITED STATES DISTRICT COURT

ORDER FILING BILL OF EXCEPTIONS—Entered February 3, 1930

This day came the said defendant St. Paul Fire & Marine Insurance Company, a corporation, by Steptoe & Johnson, James M. Guiher and Russell L. Furbee, its counsel, and came also the said plaintiff by Handlan, Garden & Matthews and Carl G. Bachmann, her attorneys; thereupon the said defendant tendered to the court and asked leave to file as a part of the record herein the complete transcript of the evidence taken at the trial of this action, and the exhibits therewith, as prepared by Mr. L. E. Schrader, the stenographer sworn for the purpose, which said transcript is marked for identification herein as "Testimony". And the said transcript of the evidence having been seen and inspected by the court, it is ordered that the same be and it is hereby filed as a part of the record in this cause.

Thereupon the defendant also tendered to the court its bill of exceptions containing a narrative of the evidence, marked for identification as "Defendant's Bill of Exceptions", as well as its petition for an appeal and supersedeas, its written assignments of error, and its notice in writing [fol. 164] to the said plaintiff that said bill of exceptions would this day be presented to the court for settlement, and that an appeal from the final judgment herein would this day be applied for, which said three papers are marked for

identification herein respectively as "Petition for Appeal", "Assignments of Error" and "Notice for Settlement of Bill of Exceptions and Notice of Appeal". And the said three papers, and each of them, having been seen and inspected by the court, and it further appearing that the said plaintiff accepted service of the said notice under date of January 20, 1930, it is therefore ordered that the said three papers, and each of them, be and they are hereby filed as a part of the record in this cause.

Enter- this the 3rd day of February, 1930.

W. E. Baker, District Judge.

IN UNITED STATES DISTRICT COURT

ORDER—ORIGINAL EXHIBITS TO C. C. A.—Entered Feb. 26, 1930

It is ordered that the Clerk shall omit from the transcript of record upon appeal in this case copies of "Plaintiff- Exhibit No. 7—Diagram", "Defendant's Exhibit No. 2—Photo", and "Defendant's Exhibit No. 3—Photo", exhibited and filed upon the trial of this case, and made a part of the record upon appeal by the pr-ecipe for the transcript of record, but in lieu thereof, said Clerk shall certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit the originals thereof, the same to be used upon oral argument of this case before said Circuit Court of Appeals, for the inspection of, and for such other purposes as may be required by said Circuit Court of Appeals, and in due and proper time that the said original papers be by the Clerk of said Circuit Court of Appeals returned to the Clerk of this Court.

Enter February 26, 1930.

W. E. Baker, Judge.

[fol. 165] ASSIGNMENT OF ERRORS—Filed February 3, 1930

Comes now the appellant St. Paul Fire & Marine Insurance Company, a corporation (defendant below), and in support of its petition for an appeal and supersedeas from the final judgment rendered against it in the above

action by the United States District Court for the Northern District of West Virginia, at Wheeling, on the 13th day of November 1929 assigns the following errors in the said judgment:

1. The trial court erred in overruling the defendant's motion to set aside the verdict of the jury and to grant defendant a new trial herein.

2. The trial court erred in entering judgment upon the verdict.

3. The verdict and judgment complained of are contrary to the law and the evidence.

4. The trial court erred in embodying in its charge to the jury, at the request of the plaintiff and over the objections of the defendant, plaintiff's instructions Nos. A, 1, 2, 3, 4, 6, 7, 8 and 10, and each of them, the portion of the court's charge including said instructions being in the words and figures following, to-wit:

Note by District Clerk

For Plaintiff's Instructions No. A, 1, 2, 3, 4, see page 144, et seq. of this record.

And for Plaintiff's Instructions No. 6, 7 and 8, see page 149, et seq. of this record.

And for Plaintiff's Instruction No. 10, see page 152 of this transcript of record.

To the said portions of the court's charge to the jury quoted above the defendant and appellant duly excepted upon the record as follows:

Note by District Clerk

For Defendant's exception upon the record, see page 160, et seq. of this record.

[fol. 166] 5. The trial court erred in refusing, over the objections and exceptions of the defendant and appellant, to incorporate in its charge to the jury defendant's written Instructions Nos. 1, 1-A, 1-B, 1-C, 3, 4 and 6, and each of them said instructions thus refused being in the words and figures following, to-wit:

Note by District Clerk

For Defendant's Instructions Nos. 1, 1-A, 1-B and 1-C, see page 153, et seq. of this record.

For Defendant's Instructions Nos. 3, 4 and 6, see page 155, et seq of this record.

6. The trial court erred in excluding from the hearing of the jury, over the objections of the defendant, the following testimony of the defendant's witness George B. Heide offered during direct examination:

"A. I searched the furniture store. We thought we smelled the odor of mash in that vicinity. We went down and smelled through some other place, and we searched, and we didn't find anything there.

Mr. Furbee: On how many occasions did you detect a smell or odor of mash——

Mr. Bachmann: We object. You are going into another question now.

Mr. Furbee: Let me finish—within the seven days next preceding the date of the fire.

Mr. Furbee: I mean in that immediate vicinity.

The Witness: Now, that is just a little hard. That has been quite awhile ago. I know two or three occasions we were there. I will say that. I feel confident we was there on two or three occasions, and I know we smelled mash there, but to draw down to conclusions, I can't just say.

The Court: Can you say how long before the fire these occasions were?

The Witness: Only my statement the first time. That is as near, Judge, as I would like to answer.

The Court: State it again.

The Witness: A week or two.

Mr. Furbee:

[fol. 167] Q. How close is the furniture store that you searched to the property known as 1312 Main Street?

A. This furniture store is either the second or third door below the National Bank of West Virginia.

Mr. Bachmann: The furniture store that he has reference to is over a full block and a half away from 1312 Main Street. Being next to the National Bank of West Virginia, it is about 1218 Main Street.

Mr. Furbee: It is approximately a half block.

Mr. Handlan: It is three-quarters.

The Court: How far is the furniture store in question from the Bachmann building that was burned, Mr. Heide?

The Witness: Your Honor, I would say it was a block at least."

7. The trial court erred in excluding and in striking out the following testimony of the defendant's witness Alonzo Prince offered upon direct examination:

"Prior to the fire in the Bachmann Building I had not observed or found any evidence of moonshine stills operating in that immediate vicinity. I had observed certain unusual odors pertaining to moonshine mash in that vicinity. I had observed the odor of mash coming very strongly from the sewer at the intersection or junction of 13th Street and Main Street about the first part of December, 1925. The Bachmann Building is located at 1312 Main Street, and this was on Alley 13, at the corner of 13th Street. I presume that all of the buildings run into that sewer. I checked on this odor by moving from one place to another in the vicinity and always traced the odor back to this one place. I went to the corner of 14th Street, and did not get any odor there, and then I came up to the corner of 12th Street, and likewise did not get the odor. I presume the entire section there drains into that sewer. I judge it was approximately 250 feet from the place where I detected the odor in the sewer to the back of the Bachmann Building."

8. The trial court erred in excluding from the hearing of the jury the following testimony of the plaintiff's wit- [fol. 168] ness Charles F. Bachmann offered upon cross examination:

"Q. Mr. Bachmann, following the fire in the Bachmann Building on December 27, 1925, is it not a fact that you were indicted by a Federal Grand Jury of the Federal Court at Wheeling, West Virginia, by the United States Government, charged with conspiracy to violate the National Prohibition Act, in connection with the operation

of the stills found in the building by the prohibition officers?

A. Not shortly. It was several months afterwards.

Q. That is, you were indicted some time after the fire?

A. Yes, sir.

Q. How long was that indictment pending here before the Federal Court, Mr. Bachmann?

A. About three years.

Q. It was my understanding that eventually the indictment was dismissed—nolled by the United States Government—is that correct?

A. Yes, sir.

Q. Mr. Bachmann, the prohibition officers never caught Bill Varisca, so far as you know, did they?

A. I don't know.

Q. You didn't see him again?

A. No, sir."

9. The trial court erred in admitting, over the defendant's objections, the following testimony of the plaintiff's witness A. S. Whitely offered upon direct examination:

"Q. Turn to rule 73 and read what that books says with respect to the particular sentence that you have just read in this rider.

Mr. Bachmann: Will you read Rule No. 1 to the jury?

The Witness (reading):

'Form No. 1. Privilege for present and other occupancies not more hazardous and to do such work and to keep and use such materials as are usual in such occupancies.

'NOTE.—It is understood that the word "materials" as [fol. 169] used above, includes gasoline and such other materials as are prohibited by the printed conditions of the policy, when kept and used for such purposes as are usual to the occupancies permitted."

10. The trial court erred in admitting, over the defendant's objections, the following testimony of the plaintiff's witness William Gutman offered upon direct examination:

"Q. Mr. Gutman, in connection with your business with Alexander R. Campbell, the insurance man, tell the jury whether or not you had occasion to go down there for the purpose of making some change in an insurance policy oc-

casioned by some change in the business that was going to be made there? Whether or not you were down there at that time?

A. Yes, sir, along early in 1925, I went down with Mr. Campbell.

Q. By Mr. Campbell you mean whom?

A. Mr. Alex R. Campbell, the man I worked for.

Q. The insurance man?

A. Yes, sir. I had some other business with Mr. Bachmann that morning. I told Mr. Campbell I was going down to see Mr. Bachmann, and he said 'Wait, I am going down, I have to look over the premises on account of——'

Q. Tell the jury whether or not you accompanied Mr. Campbell on that occasion?

A. I accompanied Mr. Campbell there and went there and met Mr. Bachmann.

Q. What did you see? What did Mr. Campbell see? What was being carried on there?

The Court: The witness may state what he saw.

Mr. Bachmann: State what you saw and what Mr. Campbell saw and where you saw the things that you are going to describe.

Mr. Furbee: He cannot state what Mr. Campbell saw.

The Court: The witness may state what he saw.

Question withdrawn.

Mr. Bachmann: What part of the Bachmann building did you go to on this occasion when you went there with Mr. Campbell?

A. Went to the office of Mr. Bachmann in the front of [fol. 170] the building on the second floor, and met him.

Q. Who was with you when you went to this office with Mr. Campbell, and what occurred there?

A. Mr. Bachmann walked out with us, opened the door and went out and met a man by the name of Mr. Huff, who he said was running this oil business, I think it was—I think it was Eze, or some such name.

Q. Auto Eze?

A. Yes, Auto Eze. He called Mr. Campbell's attention to the various barrels of oils and different things, cans, and everything, and Mr. Campbell told him that he would have to safe-guard himself—he would have to go to work and have

a can for the waste material—something in the way of a slop can, and also told him he would have to have receptacles under each of the barrels—the bungs of each barrel, to have something there to catch the oil—the drippings. There was a gas stove, and he would have to have a piece of zinc under that stove. And from there he went to the third floor.

Q. Before you leave the second floor, you say Mr. Bachmann took Mr. Campbell out and showed him these barrels of oil and cans?

A. No, Mr. Huff did.

Q. Were you there at the same time?

A. Yes, sir.

Q. And Campbell was there besides you?

A. Yes, sir.

Q. I wish, if you can, you would tell the different kinds of oils that you saw there or that were mentioned or pointed out, as to kerosene, carbon oil, gasoline, grease.

A. They mentioned grease; they mentioned oil; they mentioned gasoline, and some kind of a lubricating oil. That is the only thing I can recollect.

Q. You went, I believe, from the second floor to the third floor. Who went from the second to the third?

A. Myself, Mr. Campbell and Mr. Huff.

Q. Do you know whether his name is Ira P. Huff?

A. No, sir, I couldn't tell you that.

Q. He is a man that was, at least, conducting the business and giving the directions?

A. Yes, sir.

Q. What did you see on the third floor?

A. I don't recollect what I saw.

Mr. Guiher: I was waiting to make sure Mr. Hand-[fol. 171] land was through with this line of examination. This goes to the same extent that the Whitely evidence did some time ago. It involves the same proposition. I am going to make a motion, when he is through, to exclude this testimony. I will wait until Mr. Handlan is through.

Q. Mr. Gutman, Plaintiff's Exhibit No. 2 and Plaintiff's Exhibit No. 5, being insurance policies, one of the St. Paul Fire & Marine Insurance Company, and the other of the American Central Insurance Company, showing by their endorsements they were issued by Alex Campbell & Co.,

agents, each have attached to them what is called Form No. 4—a rider—that mentions the privilege given for 'bottling automobile oils, offices and other mercantile business not more hazardous', and signed 'Alex R. Campbell & Co.' Do you know whose signature that is?

A. Yes, sir, that is Mr. Campbell's signature.

Q. I will ask you whether you know whether or not the visit of Campbell and yourself to the Bachmann property at the time you mentioned, had any connection with the putting on of these riders?

A. Yes, that is what he went down for. He was called. He told me he was going down to see Mr. Bachmann—that he called him up."

11. The trial court erred in admitting, over the defendant's objections, the following testimony of the plaintiff's witness Edward Bachmann offered upon direct examination:

I was frequently in the Bachmann Building on Main Street when the business was being carried on there by Mr. Huff and others. Various oils, gasoline and stains were used in the Auto-Eze business conducted there."

12. The trial court erred in admitting, over the defendant's objections, the following testimony of the plaintiff's witness Edward T. Rose offered upon direct examination:

"Q. In order to present the matter concretely, Chief, I will now ask this question: You having had the experience you have had, with the Wheeling Fire Department, being present at the December 27, 1925, fire, at the prop- [fol. 172] erty on 1312 Main Street, having stayed there for about three hours and noted the intensity of the fire as it had progressed up to that time, what in your opinion would have happened to the cans of gasoline, or how would the fire *would* have affected the cans of gasoline, if there had been a five-gallon can of gasoline on the third floor located about twenty, twenty-five or thirty feet west of the east wall, and there had been twenty-five five-gallon cans of gasoline on the first floor located about twenty-five or thirty feet, approximately, west of the east wall, the cans being tin cans, square in shape, five gallons in quantity, and capped with screw tops, what would have happened to that gasoline in that fire as you saw it?

A. My opinion would be that the gasoline would have exploded. It could not have stood that heat.

Mr. Handlan: Now, Chief, if there was on the third floor of the building and near to where the five-gallon can was alleged to be, as I have described, its position in my question, and there were two gasoline compressors each being filled about half full of gasoline, and each of some twenty to twenty-five gallons capacity, and there were on the third floor—about twenty-five to thirty feet west of the east wall, what, in your opinion, would have happened to those gasoline compressors if they had that much gasoline in them?

A. I think they would have exploded, too."

13. The trial court erred in admitting, over the defendant's objections, the following testimony of the plaintiff's witness M. C. Kindelberger offered during direct examination:

"Q. Now, Mr. Kindelberger, if there had been in this building on the third floor a five-gallon can of gasoline, located about twenty to twenty-five feet west of the east wall, and two gasoline compressors, each containing a capacity of twenty to twenty-five gallons of gasoline, and each about half full of gasoline, on the third floor, located near this five-gallon can, and about twenty-five to thirty feet west of the east wall; and twenty-five five-gallon cans of gasoline down on the first floor, located between twenty and thirty feet, approximately, west of the east wall, the gasoline cans that I have described on the first floor being [fol. 173] square tin cans—ordinary gasoline cans, with screw caps for their tops, what, in your opinion would have happened to that gasoline if it had been there, as a result of that fire?

Objected to.

The Court: The witness may answer, from his experience as an expert, as to what in his opinion——

Mr. Handlan: Answering the question, in your judgment and experience in the fire department.

Objection. Overruled. Exception by defendant.

A. My opinion is that it would have exploded.

14. The trial court erred in admitting, over defendant's objections, the following testimony of the plaintiff's witness, Ashby Jackson, offered upon direct examination:

"Q. If there was a five-gallon can of gasoline on this third floor of this building during all the time that the fire was in progress, and there were two gasoline compressors also on the third floor, twenty or twenty-five gallon capacity, and each approximately about half full of gasoline, and these compressors and this five gallon can would be located on that third floor from approximately twenty to thirty feet from the east wall, west from the east wall towards the river, on that third floor, and with reference to one another were located from five to eight feet apart, and there was also twenty-five five-gallon cans of gasoline on the first floor, which was there during the entire progress of the fire, from your experience as a fireman—and assuming that these twenty-five five-gallon cans were to the rear rather than to the front—and they were possibly twenty-five to thirty feet west of the east wall on that first floor, from your experience as a fireman——

The Court: Mr. Handlan, I believe you have not stated whether or not those cans were closed?

Mr. Handlan (continuing): —and that the cans of gaso-[fol. 174] line on the first floor and the can of gasoline on the third floor were closed or secured with a screw top, and that the compressors were topped and practically tight, what in your opinion would have happened to that gasoline in those compressors and in those various cans I have described, as the result of that fire, as you saw that fire that night? What, in your opinion, would have happened to that gasoline?

The Witness: That gasoline, Mr. Handlan, would not stand that heat.

Q. How is that?

A. That gasoline you speak of would not stand that heat.

Q. What would have occurred?

A. It would explode. That would mean we would know it, because it is loud. You can see the flames, and there is no use putting water on gasoline. It simply helps it. It don't put it out."

15. The trial court erred in admitting, over the objections of the defendant, the following testimony of the plaintiff's witness Ira P. Huff offered upon direct examination:

"I was present at the building when the representatives of the different insurance companies came down and inspected the business for the purpose of adding the rider to the policy. These representatives were men by the names of Marker, Gutman and Alexander R. Campbell, the insurance man. This was the same Will Gutman who has testified in this case. At that time we had a rack along the left side of the building as you went in on which were drums of oil. We had a hot plate at the end of the building. These oils consisted of kerosene, what we call neutral oil, some vegetable oil, some gasoline, and a barrel of cup grease. Campbell came up and put his hand under the spout to see whether there was any drip of the spigots of the barrels. Mr. Marker was there also. I was asked by both gentlemen as to the nature of the ingredients. They were plainly told as to the nature of the materials and the ingredients that went into the formulas of the articles we manufactured, with reference to their inflammability. Based upon this information, we were instructed to put dripping pans under [fol. 175] each spigot of the drums, and we did so. We also were instructed to put a steel plate under the hot plate, and to provide a steel drum as a place to put refuse from the plant, such as paper and sweepings from the floor, and we did all this. I was in the Bachmann Building conducting this business from about June 1, 1925, until November 1, 1925."

16. The trial court erred in excluding from the hearing of the jury, over the objections and exceptions of the defendant, the following testimony of the plaintiff's witness Ira P. Huff offered upon cross examination:

"Mr. Guiher:

Q. Mr. Huff, I will ask you if on or about the 6th day of July, 1928, I did not examine you under oath in connection with the fire which you had on the Island, during the course of which I interrogated you regarding the materials and apparatus that you used in this process of bottling automobile oils?

Objection. Sustained. Exception by defendant.

The jury was here excluded from the court-room, and the following proceedings were had in the absence of the jury:

The last question was read.

The Witness: Yes, we did.

Mr. Handlan: We move to exclude the answer.

The Court: Suppose you let it go through until we get through. This is without the hearing of the jury.

Mr. Handlan: I did not want the Court to think we were waiving anything.

Mr. Guiher: Mr. Huff, during the course of that examination, did I not ask you if in your process of bottling automobile oils, you used any gasoline?

A. Yes, sir.

Q. Did you not say no?

A. Because the conditions were different.

Q. You admit that you told me at that time no you didn't, don't you?

[fol. 176] Mr. Handlan: Where do you mean used gasoline—at the Bachmann building or on the Island?

Mr. Guiher: I asked him about his process. I did not understand his process to be changed. He can make any explanation he wants to.

The Witness: Yes."

17. The trial court erred in admitting, over the objections of the defendant, the following testimony of the plaintiff's witness Carl G. Bachmann offered upon direct examination:

"While Huff was in the Main Street Building make the automobile products I went down there one afternoon and saw several barrels containing oil of some kind and also gasoline cans. I saw where oil had been dripping on the second floor. There was a scum of dirt practically all over that second floor and always had been since candy was manufactured in that building prior to these occupancies, and it was slippery on the floor where oil had dripped down in the process of that business. I suggested to Charles F. Bachmann that he send for the agents of the

insurance companies, including Mr. Campbell, and have riders attached to the policies. This was shortly after Huff had come into the building, in the spring or summer of 1925, probably along in the early part of 1925. I assume Huff had been there possibly a month carrying on the business."

18. The trial court erred in excluding, over the objections of the defendant, the following testimony of the defendant's witness Professor Samuel Morris offered upon direct examination:

"Q. I will ask you to state, from your experience and investigation and study as to the comparative use of natural gas on the one hand, and gasoline on the other hand for heating these jets or burners or hot plates, particularly with reference to what precautions should be taken.

A. In heating with natural gas the chief danger lies in getting a mixture of gas and air, and in the case of using gasoline there is the same danger, of course, with gasoline, but there is the added danger of keeping the supply to be used.

[fol. 177] Now, the Bureau of Mines in its pamphlet that I have referred to on hazards in handling gasoline, by George A. Burrough, says that the supply of gasoline to be used in a burner in a building or to be used in a building in any way, especially in use of a burner, should be kept outside of the building, a safe distance from the building and buried under ground, and that the gasoline should be pumped—the supply should be pumped into the building through pipes that drain backward to the container. That is, if you pump in for a small supply at the time, if a supply is to be needed, that should be pumped in and not be carried in vessels. And if it is to be carried in vessels, they should be closed vessels, and he says to use as small an amount as possible.

Q. Now, Professor, in your examination the other day, you testified that you had seen the gasoline compressor tanks which were taken from the Bachmann building, or which were pointed out to you as being that?

A. I did.

Q. I believe at that time, Professor, you explained to the jury the method in which the gasoline was gotten from such tanks to the burner. What can you say with respect

to the proper or safe location of such a gasoline compressor tank that is to be used to heat open jets or burners?

A. To such a container is attached the statement that this container should be placed outside the building in which the gasoline is burned.

Q. Just state the reason for that, if you know. What is the reason for not having the gasoline compressor tank within a few feet of the open burner?

A. There are several. In the first place, if in filling the containers there is any gasoline spilled that mixes with the air—vitalizes and mixes with the air and forms a dangerous combustible mixture which may float along the floor for several feet, and become ignited.

Q. Do you mean when filling the burner?

A. When filling the tank, I mean. If any gasoline is spilled or any should leak out, there is danger of ignition from an open burner.

Q. From your observation and examination of these gasoline compressor tanks which were pointed out to you as having been the ones involved in this case, how could they be filled? What manner was there or apparatus was [fol. 178] there for filling the tanks?

A. The only way of filling is to take off the cap and pour the liquid in.

Q. The cap on top of the tank?

A. Yes."

Wherefore, and by reason of the foregoing errors in the said final judgment, the said defendant and appellant prays that the said judgment may be reviewed and reversed.

St. Paul Fire & Marine Insurance Co., by Counsel.
Steptoe & Johnson, James M. Guiher, Russell L. Furbee, Counsel.

IN UNITED STATES DISTRICT COURT

MEMORANDUM UNDER SEC. 7 OF RULE 14 OF C. C. A.

(1) Petition for appeal filed February 3, 1930.

(2) Order allowing appeal entered February 3, 1930.

(3) Appeal and supersedeas bond approved and filed on February 3, 1930. Penalty: $6,000.00. Obligors: St. Paul

Fire & Marine Insurance Company and United States Fidelity and Guaranty Company. Conditioned for damages and costs.

(4) Citation. Dated February 3, 1930. Acceptance of service of citation dated February 5, 1930. Citation filed on February 8, 1930.

[fol. 179] STIPULATION UNDER RULE 23 OF C. C. A.—Filed February 3, 1930

It is hereby stipulated and agreed by and between counsel for Sophia C. Bachmann, appellee, and counsel for the St. Paul Fire & Marine Insurance Company, a corporation, appellant, that the Clerk of said District Court shall make up a transcript of the record in the above styled action in accordance with the precipe for such record signed and agreed to by counsel for both of said parties and furnished to said Clerk, and shall transmit the same to the Clerk of the Circuit Court of Appeals for the Fourth Circuit at Richmond, Virginia, and that the said record shall thereupon be printed under the supervision of the Clerk of the said Circuit Court of Appeals in accordance with Rule 23 of said court.

Dated this the 1st day of February, 1930.

Handlan, Garden & Matthews, Counsel for Sophia C. Bachmann, Appellee, by J. Bernard Handlan, Steptoe & Johnson, Counsel for St. Paul Fire & Marine Insurance Company, Appellant.

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR RECORD—Filed February 3, 1930

To Austin C. Merrill, Clerk of said District Court:

By agreement of the undersigned attorneys of record for the said plaintiff and the said defendant, you are hereby directed to prepare and certify to the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Vir-

ginia, a transcript of the record in the above styled action, which shall include the following papers:

1. The plaintiff's declaration herein, and the insurance policy filed therewith.

[fol. 180] 2. The defendant's general issue plea, and plaintiff's joinder therein.

3. The defendant's specifications of defense.

4. The plaintiff's reply in writing to the defendants specifications of defense.

5. Order entered on November 7, 1929, empaneling the jury and commencing trial.

6. All other orders entered during the trial of this cause between November 7 and November 12, 1929.

7. Final judgment ordered entered on November 13, 1929.

8. The defendant's bill of exceptions filed herein, including all exhibits therein set forth and referred to.

9. The orders entered herein on the 3rd day of February, 1930, filing the defendant's bill of exceptions and allowing appeal and supersedeas.

10. The defendant's written assignments of error filed herein.

11. The stipulation for printing under Rule 23, executed by counsel for both parties.

12. This precipe for the preparation of the record.

Dated this the 1st day of February, 1930.

Handlan, Garden & Matthews, Counsel for Sophia C. Bachmann, Appellee, by J. Bernard Handlan,
Steptoe & Johnson, Counsel for St. Paul Fire & Marine Insurance Company, Appellant.

[fols. 181 & 182] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 183] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 2997

ST. PAUL FIRE & MARINE INSURANCE COMPANY, a Corporation, Appellant,

versus

SOPHIA C. BACHMANN, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia, at Wheeling

March 5, 1930, the transcript of record is filed and the cause docketed.

Same day, original petition for appeal, order allowing appeal, bond and citation are certified up under Sec. 7 of Rule 14.

Same day, the original exhibits (photostats) are certified up.

Same day, the appearance of Louis A. Johnson and James M. Guiher is entered for the appellant.

March 7, 1930, the appearance of J. Bernard Handlan is entered for the appellee.

March 10, 1930, the appearance of Russell L. Furbee is entered for the appellant.

[fol. 184] March 13, 1930, the appearance of Carl G. Bachmann and Chas. J. Schuck is entered for the appellee.

April 2, 1930, twenty-five copies of the printed record are filed.

April 17, 1930, stipulation of counsel to continue cause to the October term, 1930, is filed.

Same day, cause continued in open Court to October term, 1930, per stipulation of counsel.

September 18, 1930, stipulation and joint motion of counsel to continue cause to the January term, 1931, is filed.

ORDER CONTINUING CAUSE TO JANUARY TERM, 1931—Filed September 18, 1930

Upon consideration of the stipulation and joint motion for a continua[illegible]iled in the above entitled cause, and for good cause sho[illegible]

It is ordered that the above entitled cause be, and the same is hereby, continued from the October term, 1930, to the January term, 1931, of this Court.

September 18, 1930.

John J. Parker, U. S. Circuit Judge.

Argument of Cause

January 16, 1931 (January term, 1931), cause came on to be heard before Northcott, Circuit Judge, and Watkins and Webb, District Judges, and is argued by counsel, and submitted.

[fol. 185] In United States Circuit Court of Appeals, Fourth Circuit

No. 2997

St. Paul Fire & Marine Insurance Company, a Corporation, Appellant,

versus

Sophia C. Bachmann, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia, at Wheeling

(Argued January 16, 1931. Decided April 13, 1931)

Before Northcott, Circuit Judge, and Watkins and Webb, District Judges

James M. Guiher (Russell L. Furbee and Steptoe & Johnson on brief) for Appellant and Charles J. Schuck and Carl G. Bachmann (Handlan, Garden & Matthews and Schuck, Bachman & Grimes on brief) for Appellee.

Opinion—Filed April 13, 1931

[fol. 186] Northcott, Circuit Judge:

This is an appeal from a judgment for $4,591.84 rendered in favor of the appellee, Sophia C. Bachmann, against the appellant, St. Paul Fire & Marine Insurance Company, a corporation, by the District Court of the United States for

the Northern District of West Virginia, at Wheeling, in November, 1929. The judgment was rendered in an action of assumpsit prosecuted upon a policy of fire insurance in the amount of $4,000.00 covering a three story brick business building located on Main Street in the City of Wheeling.

The insured building was badly damaged by fire in December, 1925, and it was claimed by appellant that three moonshine stills were found in the building after the fire, and that large quantities of gasoline, used in the operation of the stills, were in the building at the time of the fire, and the fire was caused by an explosion, due to the operation of the stills.

The building was managed by the husband of appellee, who as agent for the appellee had for many years attended to all the details of supervising, maintaining and leasing the building. It is conceded that appellee knew nothing about the building, the tenant, or the insurance. The building was leased to a man by the name of Varisca, in October, 1925, by appellee's husband, for a term of eighteen months, and appellee's husband testified that Varisca had paid him in advance the sum of $1,750 in cash on the rent, the building being leased supposedly for the purpose of conducting a wholesale business therein.

Evidence was offered on behalf of appellant, tending to show that Bachmann, the agent, knew or should have known that the building was used for operating stills. This was vigorously denied by Bachmann, and in submitting the case to the jury the judge instructed in the language of the policy.

Two main points are raised by appellant: (1) That in construing the "Increase of Hazard Warranty" the trial court erred in refusing to instruct the jury that an increase of hazard upon the insured premises was "within the control and knowledge of the insured", if the insured or agent had [fol. 187] "reasonable cause to believe or know" of the existence of the stills, even in the absence of actual knowledge; (2) That the trial court erred in its charge to the jury with respect to the Insurance Company's defense based upon the "Prohibited Articles Warranty" in the policy.

With respect to the Increased Hazard question, the policy provided as follows:

"Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring * * * (b) while the hazard is increased by any means within the control or knowledge of the insured."

We know of no authority contrary to the principle that an insurance policy will be construed in a manner most favorable to the insured. This has been held by this court. (Missouri State Life Insurance Company vs. Guess, 17 Fed. (2) 450, and cases there cited.)

In the case of Mutual Life Insurance Company of New York vs. Hurni Packing Company, 263 U. S. 167, Mr. Justice Sutherland said:

"The language employed is that of the company and it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it. First National Bank vs. Hartford Fire Insurance Co., 95 U. S. 673, 678-679; Thompson vs. Phenix Insurance Co., 136 U. S. 287, 297; Imperial Fire Insurance Co. vs. Coos County, 151 U. S. 452, 462."

Here the judge below charged the jury in the language of the policy, and we think fairly. It is not incumbent upon the courts to write another or a different contract of insurance between the parties. Had the Insurance Company desired to add to the contract the words "reasonable cause to believe or know", it should have written the same into the policy, and we are of the opinion that the action of the judge below was right with regard to this question.

[fol. 188] On the second point, as to the Prohibited Articles Warranty, the policy provided:

"Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring (d) * * * while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises * * * explosives * * * gasoline * * * or any other petroleum product of greater inflammability than kerosene oil."

After the issuance of the policy, the use to which the building was being put at the time of the issuance of the policy being changed, an agent of the Insurance Company

inspected the building, and the following rider was attached to the policy:

"$4,000.00 on three story brick building, with approved roof, and its additions, adjoining and communicating, occupied for bottling automobile oils, offices and other mercantile purposes not more hazardous, including foundations * * *

"Privileges granted. To keep for sale not to exceed fifty pounds of gunpowder and ten barrels of kerosene oil * * * and for present and other occupancies not more hazardous and to do such work and to keep and use such materials as are usual in such occupancies."

The Handbook of Rules in use by the West Virginia Fire Underwriters' Association, used by Insurance Companies doing business in West Virginia in 1925, and required to be filed in the office of the Commissioner of Insurance of that State provided as follows:

"Privilege for present and other occupancies not more hazardous and to do such work and to keep and use such materials as are usual in such occupancies."

"NOTE.—It is understood that the word 'materials' as used above, includes gasoline, and such other materials as [fol. 189] are prohibited by the printed conditions of the policy, when kept and used for such purposes as are usual to the occupancies permitted."

At the time of the inspection by the agent of the Insurance Company, and the attachment of the rider to the policy, the building was being used for the handling and bottling of automobile oil, and it was shown that gasoline was stored in the building, and that the agent of the Insurance Company saw that gasoline was being stored in the building. It was contended on the trial below that this rider constituted a permit for the handling of gasoline within the building, and that its effect was to remove gasoline from the Prohibited Articles Warranty, and that the quantity of gasoline, if greater than used at the time of the issuance of the permit, brought this question into the Increased Hazard Class. The trial court took this view of the case, and we think properly so. The agent of the Insurance Company knew that the rider permitted the use of

gasoline, at least to some extent, and in order to show that the hazard was increased by a greater use of gasoline, as a defense to the recovery by the insured, the Insurance Company must under the terms of the policy, as above discussed, bring such fact "within the knowledge and control" of the insured or her agent.

A number of other assignments of error were made with respect to instructions allowed or disallowed, and the admission of evidence, or the refusal to admit evidence, but an examination of the record does not disclose them to be of great importance, and none of them constitute, if error at all, vital error. It follows that the judgment of the court below upon the verdict of the jury is affirmed.

Watkins, District Judge, dissents.

[fol. 190] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2997

ST. PAUL FIRE & MARINE INSURANCE COMPANY, a Corporation, Appellant,

versus

SOPHIA C. BACHMANN, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia.

JUDGMENT—Filed and Entered April 15, 1931

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of West Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs.

April 15, 1931.

Elliott Northcott, U. S. Circuit Judge.

[fols. 191-213] Petition for rehearing, covering 24 pages, presented May 5, 1931, omitted from this print. It was denied and nothing more by order of June 29, 1931.

[fol. 214] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE PENDING PETITION FOR REHEARING —Filed May 7, 1931

Upon the application of the Appellant, by James M. Guiher, Esq., its counsel, and it appearing to the Court that the Appellant has presented a petition for rehearing herein,

It is ordered that the mandate of this Court in the above case be, and the same is hereby, stayed, pending the action of the Court upon said petition for a rehearing.

May 7th, 1931.

Elliott Northcott, U. S. Circuit Judge.

[fol. 215] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2997

ST. PAUL FIRE & MARINE INSURANCE COMPANY, a Corporation, Appellant,

versus

SOPHIA C. BACHMANN, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia, at Wheeling

ORDER DENYING REHEARING—Filed and Entered June 29, 1931

This court having at its April term, 1931, rendered its decision affirming the judgment of the said District Court appealed from in this case, and the appellant having on May 5, 1931, presented to the Court a petition for a rehearing of the said case, and the same having been carefully considered,

It is now here ordered by this Court, that the rehearing asked for, be, and the same is hereby, denied at the cost of the appellant. Let mandate issue after the expiration of five days from this date.

June 29, 1931.

Elliott Northcott, U. S. Circuit Judge.

July 3, 1931, petition of appellant for a stay of the mandate is filed.

[fol. 216] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE PENDING PETITION FOR CERTIORARI —Filed July 3, 1931

Upon the application of the Appellant, by Steptoe & Johnson, Esqs., its counsel, and for good cause shown,

It is ordered that the mandate of this Court in the above case be, and the same is hereby, stayed pending the application of the Appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application is filed in the said Supreme Court within 60 days from this date.

July 3, 1931.

Elliott Northcott, U. S. Circuit Judge.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 217] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 26, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,125. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 311. St. Paul Fire & Marine Insurance Company, petitioner, vs. Sophia C. Bachmann. Petition for writ of certiorari and exhibit thereto. Filed August 18, 1931. File No. 36,125.